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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 25

UNITED STATES OF AMERICA, PETITIONER

vs.

EDWARD B. CALDERON

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

WRIT OF HABEAS CORPUS FILED FEBRUARY 4, 1954

WRIT GRANTED JUNE 7, 1954

No. 13675

**United States
Court of Appeals
for the Ninth Circuit**

EDWARD B. CALDERON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	19
Designation of Record and Points on.....	213
Notice of	17
Stipulation for Presentation of Original Exhibits on	212
Arraignment and Plea (Minute Entry Jan. 28, 1952)	6
Certificate of Clerk to Transcript of Record..	19
Designation of Record and Points on Which Appellant Intends to Rely	213
Indictment	3
Judgment and Sentence	16
Minutes Entries:	
Jan. 28, 1952—Arraignment and Plea.....	6
Aug. 15, 1952—Order Setting Date for Trial	7
Oct. 21, 1952—Trial	8
Oct. 22, 1952—Further Trial and Verdict ...	11
Nov. 10, 1952—Judgment and Sentence.....	14

ii.

Names and Addresses of Attorneys.....	1
Notice of Appeal	17
Statement of Points on Which Appellant In- tends to Rely, Designation of Record and...	213
Stipulation for Presentation of Original Ex- hibits on Appeal	212
Transcript of Testimony and Proceedings.....	21
Instructions to the Jury	198
Witnesses	
Acosta, Louis	
—direct	150
—cross	152
Beumler, Henry	
—direct	147
—cross	148
Bowden, Percy	
—direct	149
Calderon, Edward B.	
—direct	152
—cross	180
—redirect	195
—recross	197
Clounts, Hubert B.	
—direct	34

iii.

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Fleetham, George

—direct 146

Hampel, Eugene C.

—direct 40

—cross 45

Page, Curtis

—direct 145

Sharp, Frank, Jr.

—direct 143

Tucker, Lloyd M.

—direct 50

—cross 74

Verdugo, Eugene C.

—direct 127

—cross 133

Webb, Rex E.

—direct 31

—recalled, direct 96

—cross 110

Verdict (Minute Entry Oct. 22, 1952)..... 13

	Page
Proceedings in the U. S. C. A. for the Ninth Circuit.....	217
Order of submission.....	217
Order directing filing of opinion and filing and recording of judgment.....	217
Opinion, Denman, J.....	218
Judgment.....	220
Order denying petition for rehearing.....	220
Clerk's certificate.....	221
Order extending time to file petition for writ of certiorari.....	222
Order granting certiorari.....	223

In the United States District Court for the
District of Arizona

No. C-13083—Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD B. CALDERON,

Defendant.

INDICTMENT

Viol: 26 USC 145(b)(c) (Income Tax evasion)

The Grand Jury Charges:

On or about the 10th day of July, 1947, in the District of Arizona, Edward B. Calderon, of Douglas, Arizona, who, during the calendar year 1946 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent joint income tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$3,836.68 and that the amount due and owing thereon was the sum of 0 dollars, whereas he then and there well knew their joint net income for the said calendar year was the sum of \$24,855.49, upon which said income there was owing to the

United States of America an income tax of \$7,-352.12.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C. Section 145(b).

Count Two

The Grand Jury Further Charges:

On or about the 15th day of March, 1948, in the District of Arizona, Edward B. Calderon, of Douglas, Arizona, who, during the calendar year 1947 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent joint income tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$3,663.93 and that the amount due and owing thereon was the sum of 0 dollars, whereas he then and there well know their joint net income for the said calendar year was the sum of \$11,056.82, upon which said income there was owing to the United States of America an income tax of \$1,450.70.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C. Section 145(b).

Count Three

The Grand Jury Further Charges:

On or about the 12th day of March, 1949, in the

District of Arizona, Edward B. Calderon, of Douglas, Arizona, who, during the calendar year 1948 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent joint income tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$3,590.73 and that the amount due and owing thereon was the sum of 0 dollars, whereas he then and there well knew their joint net income for the said calendar year was the sum \$6,874.43, upon which said income there was owing to the United States of America an income tax of \$230.24.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C. Section 145(b).

Count Four

The Grand Jury Further Charges:

On or about the 15th day of March, 1950, in the District of Arizona, Edward B. Calderon, of Douglas, Arizona, who, during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collec-

tion District of Arizona, at Phoenix, Arizona, a false and fraudulent joint income tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$5,683.80 and that the amount due and owing thereon was the sum of 0 dollars, whereas he then and there well knew their joint net income for the said calendar year was the sum of \$20,206.73, upon which said income there was owing to the United States of America an income tax of \$2,830.56.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C. Section 145(b).

A True Bill.

/s/ HENRY D. WAITASSE,
Foreman

F. E. FLYNN,
United States Attorney,
/s/ K. BERRY PETERSON,
Assistant U. S. Attorney

[Endorsed]: Filed Oct. 29, 1951.

In the District Court of the United States
for the District of Arizona

MINUTE ORDER

November 1951 term, at Tucson.

Minute entry of Monday, January 28, 1952 (Tucson Division).

Honorable Claude McColloch, U. S. District Judge, specially assigned, presiding.

[Title of Cause.]

The defendant is present in person with his counsel, Norman Herring, Esquire, and is advised of the nature of the charge pending against him. The defendant is now duly arraigned; a copy of the indictment is given to the defendant, the reading thereof is waived, and he is called upon to plead. The defendant's plea is not guilty, which plea is now duly entered, and

It is ordered that this case be and it is set for trial on March 19, 1952, at ten o'clock a.m., and that the defendant continue on his own recognizance.

In the District Court of the United States
for the District of Arizona

MINUTE ORDER

May 1952 term, at Tucson.

Minute entry of Friday, August 15, 1952 (Tucson Division).

Honorable James A. Walsh, United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly for trial setting this day. The defendant is present in person with his counsel, Shelley Richey, Esquire, and

It is ordered that this case be and it is set for trial on October 21, 1952, at ten o'clock a.m.

In the District Court of the United States
for the District of Arizona

MINUTE ORDER

May 1952 term, at Tucson.

Minute entry of Tuesday, October 21, 1952 (Tucson Division).

Honorable James A. Walsh, United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney, appears for the government. The defendant, Edward B. Calderon, is present in person with his counsel, Norman Herring, Esquire, and W. Shelley Richey, Esquire. Both sides announce ready for trial. A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Stipulation is now read by said United States Attorney into the record as follows: It is hereby stipulated that with reference to the assets and liabilities of the defendant as of December 31st of each of the years 1945 to 1949, inclusive, with the exception of the items of assets designated as "cash on hand" and "cash in bank" that the Government witness, Special Agent Lloyd M. Tucker, may testify from his reports as to the total of the items going to make up said assets and liabilities without producing any supporting documents or records. It is further stipulated as to items of "disbursements" and "expenditures" made by the defendant during the years enumerated which are claimed

by the Government to be non-deductible, the said witness may testify as to the total of such items for the years above enumerated without producing any supporting records.

On stipulation of counsel, it is ordered that the Clerk release all the government's exhibits heretofore admitted in evidence, to the United States Attorney.

The said United States Attorney now reads the Indictment to the jury and states to the jury the defendant's plea of Not Guilty to said Indictment. Thereafter, Norman Herring, Esquire, states the defendant's case to the jury.

Government's Case

Rex E. Webb is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Income Tax Return of Edward B. and Rafaela Calderon for the year 1946.
2. Income Tax Return of Edward B. and Rafaela Calderon for the year 1947.
3. Income Tax Return of Edward B. and Rafaela Calderon for the year 1948.
4. Income Tax Return of Edward B. and Rafaela Calderon for the year 1949.

Hubert B. Claunts is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

5. Ledger Card Savings Account of **Edward B. Calderon** and **Rafaela Calderon**.

6. Savings deposit slips (3).

Eugene C. Hammell is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

7. Savings Account, Bank of Douglas.

8. Deposit Slips for savings account of **Edward B. Calderon** (19).

Thereupon, at twelve o'clock noon, it is ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Eugene C. Hammell is now recalled and further examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

9. Bank records of the Commercial Account of **Edward B. Calderon** from January, 1945, to January, 1950.

10. Ledger sheets, Commercial Account of **Coronado Cafe** from May 10, 1945, to April 25, 1950.

Lloyd M. Tucker is now sworn and examined on behalf of the Government.

Defendant's exhibit A, notes of **Lloyd M. Tucker**, is now admitted in evidence.

And thereupon at 4:30 o'clock p.m., it is ordered that the further trial of this case be continued until October 22, 1952, at 10:00 o'clock a.m., to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

In the District Court of the United States
for the District of Arizona

MINUTE ORDER

May 1952 term, at Tucson.

Minute entry of Wednesday, October 22, 1952
(Tucson Division).

Honorable James A. Walsh, United States District Judge, presiding.

[Title of Cause.]

The jury and all members thereof, Frank E. Flynn, Esquire, U. S. Attorney, and K. Berry Peterson, Esquire, Assistant U. S. Attorney, the defendant and his counsel are present pursuant to recess and further proceedings of trial are had as follows:

Government's Case Continued

Rex E. Webb, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's exhibit 11, statement of the defendant, Edward B. Calderon, is now admitted in evidence.

Eugene C. Verdugo is now sworn and examined on behalf of the government.

Whereupon, the Government rests.

Counsel for the defendant now moves that this case be dismissed on the basis that the Government has failed to prove its case, and

It Is Ordered that said motion be and it is denied.

Defendant's Case

The following witnesses are now sworn and examined on behalf of the defendant; Frank Sharpe, Jr., George Fleetham, Percy Bowden, Curtis Page, Henry Beumler.

Thereupon, at 11:50 o'clock a.m., It Is Ordered that the further trial of this case be continued to 1:30 p.m., this date, to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently, at 1:30 o'clock p.m., the jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case Continued

L. R. Acosta is now sworn and examined on behalf of the Government.

The defendant, Edward B. Calderon, is now sworn and examined in his own behalf.

The following Government's exhibits are now admitted in evidence:

12. Photostatic copy of Income Tax Return for the year 1945.

13. Photostatic copy of Income Tax Return for the year 1944.

Edward B. Calderon, heretofore sworn, is now recalled and further examined in his own behalf.

Defendant's exhibit B, net worth statement of Edward B. Calderon, is now admitted in evidence.

And the defendant rests.

Both sides rest.

Counsel for the defendant renews defendant's motion to dismiss, and

It Is Ordered that said motion be and it is denied.

All the evidence being in, the case is argued by respective counsel to the jury. Whereupon, the Court duly instructs the jury and said jury retire at 5:35 o'clock p.m. in charge of two sworn bailiffs to consider of their verdict.

It Is Ordered that the Marshal provide meals for said jury and their bailiffs during the deliberation of this case at the expense of the United States.

Subsequently, the defendant and all counsel being present, the jury return in a body into open Court at 8:35 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to-wit:

[Title of Cause.]

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Edward B. Calderon Guilty as charged

in Count One; Guilty as charged in Count Two; Guilty as charged in Count Three; Guilty as charged in Count Four, as charged in the Indictment.

FRANK BRYAN ROE,

Foreman.

The verdict is read as recorded and no poll being desired by either side, the jury is discharged from the further consideration of this case and from further service during this term of court.

It Is Ordered that this case be and it is set for sentence on Monday, November 10, 1952, at ten o'clock a.m., and It Is Further Ordered that the defendant continue on his own recognizance.

In the District Court of the United States
for the District of Arizona

MINUTE ORDER

November 1952 term, at Tucson.

Minute entry of Monday, November 10, 1952
(Tucson Division).

Honorable James A. Walsh, United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly for sentence this day. K. Berry Peterson, Esquire, Assistant U. S. Attorney, appears on behalf of the government. The defendant, Edward B. Calderon, is present in person with his counsel, Shelley Richey, Esquire,

and is afforded an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment and counsel for the defendant makes a plea for clemency. Thereupon, the Court finds that no legal cause appears why judgment should not now be imposed and renders judgment as follows:

JUDGMENT

On this 10th day of November, 1952, at Tucson, Arizona, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 26, United States Code, Section 145(b)(c) (Income tax evasion), as charged in Counts 1, 2, 3 and 4 of the Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby fined in the sum of \$7,500.00 on Count 1 and fined in the sum of \$2,500.00 on Count 4.

It Is Further Adjudged that the imposition of sentence on Counts 2 and 3 be suspended and that said defendant be placed on probation for a period of three (3) years, conditioned that the fines imposed on Counts 1 and 4 be paid within five days; that the defendant return and pay any and all

taxes and assessments which any taxing authority shall hereafter levy against him and that he conduct himself as a law abiding citizen.

JAMES A. WALSH,

United States District Judge.

In the District Court of the United States for the
District of Arizona

No. C-13083—Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD B. CALDERON,

Defendant.

JUDGMENT

On this 10th day of November, 1952, at Tucson, Arizona, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 26, United States Code, Section 145(b)(c) (Income tax evasion), as charge in Counts 1, 2, 3 and 4 of the Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Ad-

judged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby fined in the sum of \$7,500.00 on Count 1 and fined in the sum of \$2,500.00 on Count 4.

It Is Further Adjudged that the imposition of sentence on Counts 2 and 3 be suspended and that said defendant be placed on probation for a period of three (3) years, conditioned that the fines imposed on Counts 1 and 4 be paid within five days; that the defendant return and pay any and all taxes and assessments which any taxing authority shall hereafter levy against him and that he conduct himself as a law abiding citizen.

/s/ JAMES A. WALSH,

United States District Judge

[Endorsed]: Filed Nov. 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Now the defendant, Edward Calderon, and files this, his Notice of Appeal:

1. The name of the appellant is Edward Calderon, and his address is 431 Tenth Street, Douglas, Arizona.

2. The appellant's attorneys are Richey & Herring, comprised of Norman Herring and W. Shelley

Richey, whose address is 1001 Valley National Building, Tucson, Arizona.

3. The defendant was charged with four counts, each count involving the offense of fraudulently failing to disclose his actual income and to pay the tax thereon during the years 1946, 1947, 1948, and 1949, in violation of Title 26, Section 145 (b) and (c), U.S.C.

4. After a verdict of "Guilty", the Judgment of the Court was entered on Monday, the 10th day of November, 1952. The defendant was sentenced to pay a fine in the amount of \$7,500.00 on Count One, and \$2,500.00 on Count Four of the Indictment; no jail sentence was imposed. Imposition of sentence on Counts Two and Three was suspended on condition the fines imposed on Counts One and Four be paid within 5 days, that all taxes and assessments hereafter levied be paid, and that the defendant conduct himself as a law abiding citizen.

I, Edward Calderon, the above-named defendant, appellant, hereby appeal to The United States Circuit Court of Appeals, Ninth Circuit, from the abovestated Judgment and the whole thereof.

Dated this 18th day of November, 1952.

RICHEY & HERRING,

Attorneys for Appellant, Edward
Calderon,

/s/ **NORMAN HERRING,**
Member of the Firm

[Endorsed]: Filed Nov. 18, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Edward B. Calderon, Defendant, numbered C-13083 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that said original documents and said copies of the minute entries constitute the entire record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Indictment, filed October 20, 1951.
2. Minute entry of January 28, 1952.
3. Minute entry of August 15, 1952.
4. Minute entry of October 21, 1952.
5. Minute entry of October 22, 1952.

6. Government's Exhibits 1 to 13 and Defendant's Exhibits A and B.
7. Verdict, filed October 22, 1952.
8. Minute entry of November 10, 1952.
9. Judgment, filed November 10, 1952.
10. Reporter's Transcript of Testimony, filed December 16, 1952.
11. Order for Payment of Fine to Clerk in Escrow Pending Appeal, filed November 18, 1952.
12. Notice of Appeal, filed November 18, 1952.
13. Designation of Record on Appeal, filed November 18, 1952.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$3.60 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 24th day of December, 1952.

[Seal]

WM. H. LOVELESS,
Clerk

/s/ By CATHERINE A. DOUGHERTY,
Chief Deputy.

**In the District Court of the United States
for the District of Arizona**

No. C-13083

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD B. CALDERON,

Defendant.

TRANSCRIPT OF RECORD

Appearances: Mr. Frank Flynn, United States Attorney, and Mr. K. Berry Peterson, Assistant United States Attorney, for the plaintiff. Mr. Norman Herring and Mr. Shelley Richey for the defendant.

The above entitled matter came up for trial before the Honorable James A. Walsh, Judge, and a Jury, on the 21st day of October, 1952, at Tucson, Arizona, and the following proceedings were had, to wit:

The Clerk: Number C 13083, United States of America versus Edward B. Calderon.

Mr. Peterson: The Government is ready.

Mr. Richey: Defendant is ready.

The Court: Have you called the roll of the Jury?

The Clerk: No, your Honor. [1*]

(Jury roll called.)

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: The Clerk will call the names of twenty-eight jurors.

(Jury panel sworn.)

The Court: Ladies and gentlemen, the case for trial today is a criminal case. It is a criminal prosecution instituted by the United States of America as the plaintiff against Edward B. Calderon. Mr. Calderon, would you rise, please. This is Mr. Edward Calderon, the defendant, and I am informed he resides at Douglas, Arizona.

The prosecution is based upon the charge of violation of the Internal Revenue laws of the United States. In brief, the defendant is charged in four counts or four charges with willfully and knowingly having attempted to evade and defeat certain income taxes the Government contends were due from him and his wife. That in substance is the nature of the case.

The defendant is represented by Mr. Herring, who is the gentleman in the grey suit at this end of the table, and by Mr. Riehey, his partner. The Government is represented in the case by Mr. K. Berry Peterson, who is the gentleman with his back to the jurors in the box and the one closest to the Court; the Government is also represented by Mr. Frank Flynn, seated next to Mr. Peterson. He is the United States Attorney for the District of Arizona.

I will ask you ladies and gentlemen if any of you or any [2] members of your immediate family to your knowledge are acquainted with the defendant Calderon. You are, sir? What is your name?

Mr. Sabor: Sabor. I have done business with

him is the only acquaintance I have with him is a business acquaintance.

The Court: That is a business acquaintanceship?

Mr. Sabor: I sold him goods.

The Court: Has that been a continuous or intensive relationship?

Mr. Sabor: It has been over a year ago.

The Court: It has not been something carried on for a great number of years?

Mr. Sabor: No, sir.

The Court: In view of that acquaintanceship do you feel, Mr. Sabor, that there would be any embarrassment to you or that you would be prejudiced in one way or the other if you were selected?

Mr. Sabor: No, sir, I don't think so.

The Court: Do you think you could do your duty and try the case from the evidence from the witness stand and from the Court's instructions if you were selected.

Mr. Sabor: I do, sir.

The Court: Was there any other juror that answered that question affirmatively?

Have any of the lawyers in the case—I have mentioned [3] Mr. Herring, Mr. Richey, Mr. Flynn and Mr. Peterson—have any of those attorneys in the case ever represented any of you as your counsel, or have they to your knowledge ever represented any members of your immediate family?

Now, possibly all of the counsel being rather well known, one or the other of them may be known to you; they may be acquaintances of yours. If that is true I will ask any of you acquainted with coun-

sel if there would be anything in that relationship that would tend to influence you, embarrass you, in any manner if you were chosen as a trial juror in this case. Do any of you know of the facts in the case or purported facts, whether gathered from newspaper stories or rumors or any fashion? Do any of you know or think you know anything about the facts in the case?

Do any of you have any prejudice one way or the other concerning a prosecution of this type, that is, a prosecution for violation of income tax laws of the United States?

Do any of you have any feelings or conviction that the income tax laws, the laws involving laws on income tax, are bad laws?

Have any of you or any members of your immediate family to your knowledge ever had any controversy or dispute with the Bureau of Internal Revenue?

Are any of you or any members of your immediate family employees of the United States Government. [4]

Mr. Nicholas: Retired from the Navy.

The Court: Would that fact influence you in any way if you were chosen as a juror in this case?

Mr. Nicholas: No, sir. You just asked if I was an employee of the United States.

The Court: I asked that, and it is important that counsel know. I appreciate your stating exactly your situation because it may interest counsel. I take it from your answer you could, if chosen

as a juror, could fairly try this case both for the Government and the defendant.

A Juror: Your Honor, I have a brother that works for Civil Service.

The Court: I take it your answer to my question regarding your ability to try the case fairly and impartially, there is nothing by reason of the fact that your brother is in the Government service that would influence you in any way?

The Juror: No, sir.

A Juror: I am employed by the Agricultural Extension Service.

The Court: Could you, if chosen as a juror, try the case fairly and impartially both for the Government and the defendant?

The Juror: Yes.

The Court: Are any members of the jury or your immediate families engaged in law enforcement work, that is, deputy [5] sheriff, police officer or peace officer? I take it some of you have had previous service on the jury; you may know and others may not know, when the evidence is all in and counsel have made their arguments the Court instructs the jury as to the law, the law applying to the particular case on trial. It is the duty of the jurors to take the law as the Court gives it to them. In other words, they take the law from the Court and it is their duty to apply the law as the Court gives it to them, regardless of the validity or soundness of the law. Is there any juror that could not do that if chosen as a juror in this case?

All of you, I am sure, are familiar with the

proposition that in a criminal case the burden rests in the Government to establish the guilt of the defendant from the evidence beyond all reasonable doubt. That is the burden which the law imposes on the Government. Is there any juror that has any quarrel with that situation or believes it is unsound? Do any of you know any reason whatever, whether I have mentioned it, any reason whatever why you couldn't if chosen as a juror in this case try this case fairly and impartially both as far as the Government and the defendant are concerned?

Do counsel have any questions?

Mr. Peterson: No questions, your Honor.

Mr. Herring: Ladies and gentlemen, have any of you sat on a jury panel within the last year in this Court? [6]

Do any of you have any relatives who have sat on a jury panel within the last year in this Court?

Any members of your immediate family been on a jury panel within the last year?

I take it there being no response you have none.

The Judge mentioned there will be instructions given to the jury at the close of all the argument and close of all the evidence, and I take it from your answers, or rather from your failure to answer, each of you would be guided by those instructions as applied to the facts and notwithstanding return a verdict either for the defendant or the Government if from those instructions and the facts you thought that was the right thing to do? That is correct.

Now, in the event it appears that Mr. Calderon here has failed to pay his income tax which was due and it would appear to you that he failed to pay this tax because he believed he was doing exactly right, that is, he didn't know he owed it, would any of you feel——

Mr. Peterson: Just a moment, your Honor, we object to that question. It is argumentative. I don't think it is a proper question.

The Court: That is not proper voir dire. Objection sustained.

Mr. Herring: Do you feel merely because the Government is bringing this prosecution there must be something to it? [7] You realize that very often cases come before the courts and before juries in which the question to be determined is the intent or intention with which a defendant or a man has done a particular act, and it is up to you to decide what that intention is from all the evidence. You understand that.

In this instance is there any one of you who feels after hearing this discussion from the Judge and myself you couldn't act as a fair and impartial juror in this case? In other words, any of you feel if you yourself were charged in a case of this kind, or someone of your immediately family were charged with this same offense, would you be willing to have people in your own individual frame of mind sit as a trial juror? I take it by your silence you would, all of you, feel you can be fair and impartial.

Now, I realize that asking questions like this to

hurry things along, in a group, it takes a little moral courage to put up your hand. But I want to be certain about this, both for the defense and the Government. Do any of you feel that merely because a Treasury Department official of the Government brings a charge of this kind there must be something to it? If you do think so, put up your hand because after all none of us here want an advantage. All we want you to do is be completely fair and impartial.

Do any of you have the slightest feeling in your mind that merely because the Government brings a charge there must [8] be something to it?

That is all.

The Court: Counsel will strike the jury.

(Jury sworn.)

The Court: The jurors now in the body of the court room, you will be subject to call. Thank you for your attendance this morning.

Mr. Flynn: At this time we would like to read into the record a stipulation that counsel have stipulated to. I will read it from the record, which is identical with the former stipulation.

The Court: Very well.

Mr. Flynn: It is hereby stipulated that with reference to the assets and liabilities of the defendant as of December 31st of each of the years 1945 to 1949, inclusive, with the exception of the items of assets designated as "Cash on Hand" and "Cash in Bank" that the Government witness, Special Agent Lloyd M. Tucker, may testify from his reports as to the total of the items going to make

up said assets and liabilities without producing any supporting documents or records.

It is further stipulated as to items of "Disbursements" and "Expenditures" made by the defendant during the years enumerated which are claimed by the Government be non-deductible the said witness may testify as to the total of such items for the years above enumerated without producing any [9] supporting records.

We ask the record show that is stipulated to by the defense and the Government.

The Court: The record may so show.

Ladies and gentlemen, counsel has read to you a stipulation of an agreement entered into between them in this case. That was the purpose of counsel's reading these agreements between counsel in this case.

Mr. Peterson: Your Honor, at this time may I have an Order releasing the Government's exhibits in the Clerk's file to the United States Attorney's Office, all Government exhibits?

The Court: There may be such an Order releasing to the United States Attorney all Government exhibits in the files.

Mr. Herring: Could the record further show in the event the Government does not use these exhibits counsel for the defense may also have access to them?

The Court: Yes, both counsel have free access to any exhibits in the file.

Ladies and gentlemen, throughout the trial of the case the Court takes brief recesses for the con-

venience of counsel and jurors. Ordinarily those recesses are approximately for fifteen minutes. In this particular instance there is some documentary evidence to be prepared for admission here, so at this time we will take our first recess. We will take it until [10] 11:15. I think we will save a little time by giving counsel a chance to get their papers in order. So we will have a recess at this time.

Mr. Peterson: I don't think we can get these together and go on then with these witnesses at that time.

The Court: That is half an hour. We will take a recess to 11:15. I think in thirty minutes you should be able to get the records in shape.

Ladies and gentlemen, during the recesses do not discuss the case among yourselves or with anybody else. I will refer to that admonition from time to time. It is most important you do not discuss the case with anybody else and you do not make up your minds until it is finally submitted to you. That admonition will hold throughout the trial and until the conclusion of the trial.

We will recess until 11:15.

(Recess.)

The Court: Proceed with your statement, **Mr. Peterson.**

(Indictment read by Mr. Flynn.)

(Opening statement by Mr. Herring.)

The Court: Call your first witness.

REX E. WEBB

called as a witness herein, having been first duly sworn, testified as follows: [11]

Direct Examination

Q. (By Mr. Peterson): Please state your name.

A. Rex E. Webb.

Q. Where do you live?

A. 5015 North Tenth Place, Phoenix, Maricopa County, Arizona.

Q. What is your business?

A. Deputy Collector Instructor, Bureau of Internal Revenue, United States Treasury Department.

Mr. Peterson: May I have these exhibits marked for identification.

(Government's Exhibits 1, 2, 3 and 4 marked for identification.)

Q. Mr. Webb, I hand you Government's Exhibit 1 for identification and ask you if you know what that document is.

A. Yes, sir, this is a joint income tax return filed for the year 1946 by Edward B. Calderon and wife.

Q. Do you know where that was filed?

A. With the Collector of Internal Revenue at Phoenix, Arizona.

Q. Is that part of the official records of the Internal Revenue Department? A. It is.

Q. Kept in the regular course of business?

A. Yes, sir. [12]

Mr. Peterson: We offer that in evidence, your Honor.

(Testimony of Rex E. Webb.)

Mr. Herring: May I see it, please. No objection.

The Court: It may be admitted.

(Government's Exhibit 1 in evidence.)

Q. I will hand you Government's Exhibit 2 for identification and ask you if you recognize this document, Mr. Webb. A. I do.

Q. What is that?

A. A federal income tax return filed for the year 1947 by Edward B. Calderon and wife.

Q. And that is part of the records of the Internal Revenue Department in Phoenix, is it?

A. It is.

Mr. Peterson: We offer this in evidence.

Mr. Herring: No objection.

The Court: It may be admitted.

(Government's Exhibit 2 in evidence.)

Mr. Peterson: I hand you Government's Exhibit 3 for identification and ask you if you recognize that document, Mr. Webb.

A. I do.

Q. What is it?

A. A federal income tax return filed for the year 1948 by Edward B. Calderon and wife.

Mr. Peterson: We offer this in evidence. That is part [13] of the records of the Internal Revenue Department at Phoenix, Arizona?

A. It is.

Mr. Herring: No objection.

The Court: It may be admitted.

(Government's Exhibit 3 in evidence.)

Q. Mr. Webb, I hand you Government's Exhibit

(Testimony of Rex E. Webb.)

4 for identification and ask you if you recognize this exhibit and this document. A. I do.

Q. What is that?

A. The federal income tax return filed for the year 1949 by Edward B. Calderon and wife.

Q. Yes, sir. That is part of the records of the Internal Revenue Department at Phoenix?

A. It is.

Mr. Herring: No objection.

The Court: It may be admitted.

(Government's Exhibit 4 in evidence.)

Mr. Peterson: You may cross examine. At this time, your Honor, I ask for permission to return Mr. Webb to the witness stand at a later time on another matter.

The Court: Very well.

Mr. Herring: In order to save time may we have your avowal you will return him at a later time?

Mr. Peterson: Yes.

Mr. Herring: No questions.

The Court: I take it, Mr. Herring, you are reserving your cross examination, if you have any, until he returns?

Mr. Herring: That is right.

The Court: Very well. You may step down.

HUBERT B. CLOUNTS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Peterson): Will you just state your name. A. Hubert B. Clounts.

Q. Where do you live, Mr. Clounts?

A. 1009 Ninth Street, Douglas, Arizona, Cochise County.

Q. What is your business?

A. Assistant Manager of the Valley National Bank.

Mr. Peterson: May this be marked for identification.

(Government's Exhibit 5 marked for identification.)

Q. I hand you a document now marked as Government's Exhibit 5 for identification, Mr. Clounts, and ask you if you recognize what that is.

A. Yes, sir, I do.

Q. Will you just tell the Judge and the jury what that is.

A. That is a joint savings account for E. B. or Rafaela [15] Calderon.

Q. Between what dates?

A. Between July 3rd of '48 up to December 1951. That is a present balance on there now, also it is up to now.

Mr. Peterson: We offer this in evidence, your Honor.

Mr. Herring: May I see that, please. May I ask

(Testimony of Hubert B. Clounts.)

Mr. Clounts a question or two about this exhibit?

The Court: Very well.

Q. (By Mr. Herring): Mr. Clounts, you never saw this before in your life, did you?

A. No, sir, I have never seen that ledger card.

Q. Except for what is printed on it you don't know what bank it is from, do you?

A. Well, no. That is our standard form. That is the bank form.

Q. Just answer the question, please. Except for the way it looks it could be from any bank in the country, couldn't it? Is that right?

A. No, sir, that is our form.

Q. Do you know who prints these forms for you?

A. No, sir.

Q. Do you know very many banks use this form?

A. No, sir.

Q. As far as you are concerned is there anything on here that would point out to you unerringly this was from your [16] bank? Where does it say that on here? Where does it say on there it is from your bank?

A. The Valley National Bank isn't on here.

Q. You never saw this before in your life?

A. No, sir, I never saw that particular card.

Mr. Herring: I object to it on the ground the proper foundation has not been laid.

The Court: The objection will be sustained.

Mr. Peterson: Well, your Honor, then that means I will have to take a recess on this trial because the man that was originally here in charge

(Testimony of Hubert B. Clounts.)

of that I found out Monday afternoon was in Kingman, it was impossible to get him down here at that time in order to prove this case. I will have to have time to obtain a witness.

The Court: We can go ahead with other evidence and you can send for him. This is one particular exhibit.

Mr. Peterson: It is a very important exhibit.

The Court: I recognize that, but let's proceed and counsel can go ahead.

Mr. Peterson: May I ask a question or two. Didn't you check up with the records of the bank in regard to the savings account of Edward B. Calderon before you left Douglas? A. Yes, sir.

Q. Does this document coincide with it?

A. That is the balance in our bank. [17]

Q. That is the balance in your bank?

A. Yes, sir.

Q. From the records of your books?

A. Yes.

Q. This is merely a copy of it?

A. Yes, sir.

M. Peterson: We offer it again.

The Court: Any objection?

Mr. Herring: Yes. The figures, not only the balance, but the figures when deposits were made and everything else is vitally important. Your Honor, counsel very well knew this exhibit was important and the means have been available for the Government for a long time to come in here with a witness to testify about these things so as to leave no doubt.

(Testimony of Hubert B. Clounts.)

I do wish to object. I don't think it is probable or possible or reasonable to try and identify an exhibit like this by this means.

The Court: The objection will be sustained.

Mr. Peterson: Your Honor—will be what?

The Court: Sustained.

Mr. Peterson: Of course the situation, Mr. Herring says we had ample time, I did have ample time——

The Court: That isn't the basis of the Court's ruling. There are certain rules of evidence for admission of documents. You must make proper identification; obviously it hasn't been done here. Why the man that could identify it isn't here I don't know. I am only going by the rules in regard to identification.

Mr. Peterson: The subpoena was issued three weeks ago. I was only notified Monday afternoon late the man who testified before was in Kingman, it would be impossible to get him down here by this time this morning. I instructed the bank to send me somebody who had access to the records. That is why this man is here.

Mr. Herring: Perhaps we can assist the Government on this, if I could ask the witness a question or two. We have no desire to just throw a big sprag in the wheel of this proceeding because Mr. Peterson wasn't prepared.

Mr. Clounts, do you have in your pocket a copy of these records which you took from the Valley Bank this morning? A. Yes, sir.

(Testimony of Hubert B. Clounts.)

Q. (By Mr. Herring): Well, get them out, please. Do you have a copy of this record?

A. This is a copy of the original record there. The Court has our original file.

Q. You took that from the records of the Valley Bank in your official capacity before you left Douglas, is that right? A. Yes, sir.

Mr. Herring: Could I see that, please.

(Document handed to counsel for defendant.)

Mr. Herring: Your Honor, since we have compared this photostat which he brought with him with the exhibit Mr. Peterson offers, and in view of the man's testimony, we have no objection now to the introduction of this exhibit in evidence. May we have this photostat for our use? You have no further use for it, do you?

The Witness: That is our file.

Mr. Herring: That is the only file you have?

The Witness: Yes, sir. The Court has our original file.

Mr. Herring: Well, then under those circumstances I will return it to you. We have no objection to it.

The Court: Government's Exhibit No. 5 for identification will be admitted in evidence.

(Government's Exhibit 5 in evidence.)

Q. (By Mr. Peterson): I will ask you to examine Government's Exhibit 5 for identification and could you tell from that the amount of the deposit in this savings account at the end of the year 1948 and at the end of the year 1949?

(Testimony of Hubert B. Clounts.)

Mr. Herring: Your Honor, I believe the exhibit having been introduced in evidence speaks for itself.

The Court: May I see it. I think before we go any further we should have it marked in evidence so the record will be straight.

Mr. Peterson: I made my motion and he said he had no objection. [20]

The Court: No, the Clerk has not made the admission. It is now Government's Exhibit 5 in evidence. He may answer.

A. At the end of 1948 there was \$762.08; at the end of 1949 there was \$1,776.92.

The Court: When you say "the end" you mean on December 31, 1948 and December 31, 1949?

A. Yes, your Honor.

Mr. Peterson: May this be marked for identification, please, being three slips of paper.

(Government's Exhibit 6 marked for identification.)

Q. I hand you Government's Exhibit 6 for identification and ask you before your coming here if you made any investigation as to what these are, Mr. Clounts.

A. Yes, sir.

Q. Did you take any record from the bank as to what they were?

A. Yes, sir.

Q. Do you have that record with you?

A. Yes, sir.

Q. Can you state from that record and those slips as to what they are?

A. These are deposit slips through the savings account of Edward Calderon.

(Testimony of Hubert B. Clounts.)

Q. What were the dates those were made?

A. Deposit made July 7, 1948; July 3, 1948; and June 6, 1949. [21]

Mr. Peterson: Yes, sir. We offer these in evidence.

Mr. Herring: No objection.

The Court: It may be admitted.

(Government's Exhibit 6 in evidence.)

Mr. Herring: By the way, your Honor, if this gentleman would like to replace these exhibits with the photostatic copies he has and take the original back to his bank, we have no objection. That depends on what the Government wishes to do.

Mr. Peterson: I think we had better keep the original exhibits here until after the trial.

The Court: Very well.

Mr. Peterson: You may cross examine.

Mr. Herring: No questions. Your Honor, Mr. Clounts came from out of town. We would be perfectly willing to stipulate he may go home.

Mr. Flynn: He may be excused as far as we are concerned.

EUGENE C. HAMPEL

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Peterson): State your name.

A. Eugene C. Hampel.

Q. Where do you reside? [22]

(Testimony of Eugene C. Hampel.)

A. Douglas, Arizona.

Q. How long have you resided there?

A. Since 1916.

Q. What is your employment?

A. Assistant Cashier for the Bank of Douglas.

Q. How long have you been so employed?

A. I have been an employee of the Bank of Douglas since 1936.

Mr. Peterson: May I have this marked for identification.

(Government's Exhibit 7 marked for identification.)

Q. Mr. Hampel, I hand you Government's Exhibit 7 for identification, the exhibit consisting of two sheets of paper, and ask you if you can state what that is.

A. The first sheet is the original record of savings account of Mr. and Mrs. Edward Calderon, Account Number 11796, from October 28, 1935 to January 12, 1949. The second sheet is a certified copy of the same savings account from February 24, 1949 to December 22nd, 1949. In other words, it is a continuation of the account which leaves off on this sheet ending January 12, 1949.

Q. That is a part of the records of the Bank of Douglas? A. Yes, sir.

Q. Kept in the regular course of business?

A. Yes.

Mr. Peterson: We offer this exhibit in evidence, your Honor. [23]

(Testimony of Eugene C. Hampel.)

Mr. Herring: We have no objection. We would like to see it after it is marked.

The Court: It may be admitted.

(Government's Exhibit 7 in evidence.)

Mr. Peterson: Will you mark this series for identification as one exhibit.

(Government's Exhibit 8 marked for identification.)

Q. Mr. Hampel, I hand you Government's Exhibit 8 for identification, being a series of deposit slips, and ask you what they are.

A. These are deposit slips to the savings account of Edward Calderon. You want me to detail them?

Mr. Peterson: Well, we offer this in evidence, your Honor.

Mr. Herring: Just what dates, so the record will be straight. Between what dates and how many of them, Mr. Hampel?

The Witness: The first one is October 19, 1945. There are nineteen of them. And the last one is dated December 22, 1949.

Mr. Herring: How many of them?

The Witness: Nineteen.

Q. Are those deposits which are in the Government's exhibit you have in your hand reflected in the record of Government's Exhibit 8, being the records of the bank? [24]

A. They should be, but I couldn't say unless I checked them against the sheet.

Q. Will you do so.

(Testimony of Eugene C. Hampel.)

A. I find one dated May 14, 1946 on the ledger sheet shows May 13, 1946.

Q. Is that for the same amount?

A. Same amount, \$1,000.00. Yes, sir, they are all reflected on these sheets except the date of the one I mentioned.

Q. That might have been——

A. It could have been put in late in an afternoon.

Q. And posted the next morning?

A. Posted the next day.

The Court: I understood, Mr. Peterson, you offered the slips in evidence?

Mr. Peterson: In evidence, yes.

The Court: Any objection?

Mr. Herring: No objection.

The Court: They may be admitted.

(Government's Exhibit 8 in evidence.)

The Court: At this time we will take the noon recess until 2:00 o'clock p.m.

Ladies and gentlemen, please bear in mind the admonition given you before. Don't discuss the case between yourselves or with anyone else and don't make up your minds until the case is finally submitted to you. [25]

(Whereupon a recess was taken at 12:00 o'clock noon until 2:00 o'clock p.m.)

The Court: You may proceed.

Mr. Peterson: May this series of bank records be marked as one exhibit for identification.

(Government's Exhibit 9 marked for identification.)

(Testimony of Eugene C. Hampel.)

Q. Mr. Hampel, I hand you Government's Exhibit 9 for identification being several sheets of bank records, and ask you what those are.

A. These are the bank's record of the commercial account of Edward Calderon from April 12, 1945—no, January 1945 until January 1950.

Q. Until January 1950? A. Yes.

Mr. Peterson: We offer these in evidence, your Honor.

Mr. Herring: You know those are the records of that account, Mr. Hampel? A. Yes.

Mr. Herring: We have no objection to them being in evidence.

The Court: They may be admitted.

(Government's Exhibit 9 in evidence.)

Mr. Peterson: I will ask you to mark this series of bank records as one exhibit for identification.

(Government's Exhibit 10 marked for identification.) [26]

Q. I hand you Government's Exhibit 10 for identification, Mr. Hampel, and ask you if you know what that record is.

A. These are the ledger sheets of the commercial account entitled Coronado Cafe from May 10, 1945 to April 25th, 1950.

Mr. Peterson: We offer this in evidence, your Honor.

Mr. Herring: Excuse me a moment. Mr. Hampel, what are those?

A. It is the individual ledger sheets of account entitled Coronado Cafe.

(Testimony of Eugene C. Hampel.)

Mr. Herring: And you know of your own knowledge and you are sure that is an exact rescript of the account or original ledger sheets?

A. They are the original ledger sheets.

Mr. Herring: No objection.

The Court: They may be admitted.

(Government's Exhibit 10 in evidence.)

Q. Mr. Hampel, do you know of your own knowledge Eddie Calderon was the operator of the Coronado Cafe? A. Yes, I do.

Q. During those periods shown by the records of the bank? A. Yes, sir.

Q. Calling your attention to Exhibits 10 and 11, 10 being the commercial account of Edward Calderon and Exhibit 9 and Exhibit 10, do those records show the balance in those accounts at the end of each year, 1945, 1946, 1947, 1948 and [27] 1949?

A. Yes.

Mr. Peterson: That is all.

Cross Examination

Mr. Herring: I want the exhibit which shows the savings account in the Bank of Douglas, 7, I guess.

Q. Mr. Hampel, handing you this exhibit to refresh your recollection, I ask you to examine it, particularly with reference to the years ending in 1943, along about in October of 1943, would you examine particularly the deposits with reference to that year. When does that record show the last deposit was made in that savings account during the year

(Testimony of Eugene C. Hampel.)

1943, other than interest? I mean the last deposit that was made to the account other than savings account interest. A. June 19.

Q. June the 19th? A. Yes.

Q. And how much was that deposit?

A. \$700.00.

Q. When does the next deposit appear? That is June 19th, 1943, \$700.00? A. Yes, sir.

Q. When does the next deposit appear in that account other than interest? [28]

A. It is on October 19, 1945.

Q. October 19, 1945. And how much was deposited at that time? A. \$1,000.00.

Q. So there was nothing deposited in that account between June of 1943 and October of 1945, is that correct?

A. That is correct, excepting the interest.

Q. Except the interest deposited by the bank?

A. Yes.

Q. Mr. Hampel, during the years 1943 to 1945 there was an Air Base located close to Douglas, was there not? A. I think so.

Q. And at that Air Base there were many cadets and soldiers, that is, air cadets and soldiers?

A. Yes.

Q. Do you know how many?

A. No, I don't.

Q. The smelter was also running at full blast?

A. Yes.

Q. Business in general was excellent in Douglas during that period? A. Yes.

(Testimony of Eugene C. Hampel.)

Q. Especially in the music machine business which the soldiers helped patronize was good, isn't that so? A. I would say so. [29]

Q. In the year 1946 what happened to the Air Base?

A. I don't recall when the Air Base was discontinued.

Q. It was in either late '46 or early '47, wasn't it? A. Somewhere in there.

Q. About that time the smelter cut down on their production too, didn't they, to some extent?

A. I don't recall.

Q. But in general business since 1945, let's say January 1, 1946, business in Douglas has been on a complete downgrade, hasn't it?

A. To a certain extent, yes.

Q. As a matter of fact, until just recently within the last maybe year business in Douglas was very bad after they shut down the Air Base?

A. Yes, it declined. I don't know whether you would call it bad or not but it had declined.

Q. And declined seriously, really?

A. Yes.

Q. Now, referring to the exhibit you have before you, what was the balance in that account as of December 31st, 1949?

A. Well, the 31st after the interest was posted, \$17,334.24.

Q. \$17,300 and what? A. 334.24.

Q. And that exhibit you are speaking of is the Government's Exhibit No. 7, the one you are testi-

(Testimony of Eugene C. Hampel.)

fying from there, the one [30] you have before you?

A. I suppose so. Yes.

Q. It is a record of this savings account in the Bank of Douglas of Eddie Calderon and his wife?

A. That is right.

Q. Would you hand the witness Government's Exhibit 9, please.

(Government's Exhibit 9 handed to witness.)

Q. Now, this Exhibit 9, Government's Exhibit 9, is before you at this time? A. Yes.

Q. And that is the bank record of the checking account of Edward Calderon?

A. That is right.

Q. That is his business account apparently?

A. Yes.

Q. Calling your attention on that exhibit to the year of December 31, 1945, will you tell me what the balance on that account shows?

A. December 31, 1945, shows a balance of \$693.91.

Q. What was the balance shown by that exhibit as of December 31st, 1947?

A. December 31st, 1947, \$1,665.64.

Q. And what was the balance as shown by that exhibit as of December 31st, 1949?

A. December 31, 1949, \$891.59. [31]

Q. Did you ever see this Mr. Webb here who testified for the Government earlier today, have you seen him before? A. Yes.

Q. One of the times you saw him before was in connection with this case when he came into your

(Testimony of Eugene C. Hampel.)

bank and asked to examine these same records, wasn't it? A. Yes.

Q. At that time he was in company with Mr. Tucker who sits here by Mr. Flynn at Government counsel table?

A. I didn't understand that.

Q. When Mr. Webb came in to look at these records you are testifying from, came in to the bank —by the way, what year was that? 1949? 1950?

A. I don't recall the date.

Q. At any rate, they were investigating Edward Calderon's accounts, is that right?

A. That is right.

Q. Was Mr. Tucker with Mr. Webb? A. No.

Q. Mr. Webb came in by himself?

A. He must have.

Q. Did Mr. Tucker come in and examine the bank records himself?

A. I don't remember seeing him.

Q. If he did, he didn't get it through you? [32]

A. Not that I recall. He might have.

Q. You gave Mr. Webb complete access to all these accounts of Mr. Calderon? A. Yes.

Q. Gave him every cooperation he asked for?

A. Yes.

Mr. Herring: That is all.

Mr. Peterson: That is all. May Mr. Hampel be excused?

Mr. Herring: Yes, we have no objection.

The Court: He may be excused.

LLOYD M. TUCKER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Peterson): Will you state your name, please. A. Lloyd M. Tucker.

Q. What is your business, Mr. Tucker?

A. I am a Special Agent with the Intelligence Division of the United States Bureau of Internal Revenue.

Q. How long have you been such?

A. Since 1945.

Q. Did you make an investigation into the charges of the United States Government against the defendant in this case, one Edward Calderon?

A. Yes, sir.

Q. Did you prepare at the time of your investigation the exhibit which you have in your hand?

A. Yes, sir.

Q. Will you explain to the jury what you mean when you say a "Net Worth Statement"?

A. A Net Worth Statement is a means used by the Government, and by private accountants and in all accounting circles, for determining income for any particular period, a calendar year or any part of a year. It consists of determining an individual's ownership of assets at any particular time, property owned, money that he had, and give him credit for the debts that he owed, his liabilities. You arrive at a figure for the beginning of that period and then you use that same computation for the

(Testimony of Lloyd M. Tucker.)

end of the period, determine his ownership of assets and the liabilities that he had, then also his expenditure of money for personal reasons which are not deductible for income tax purposes. The difference would be termed his increase in net worth.

Q. Mr. Tucker, when you started your investigation did you inquire into particularly the years 1945, '46, '47, '48 and '49, as to the amount of Cash on Hand held by Mr. Calderon at the beginning of those years?

A. Yes, sir, I made such inquiries.

Q. Whom did you inquire from? [34]

A. From Mr. Calderon.

Q. And the year 1945 did you inquire from him as to how much cash he had on hand?

A. Yes, sir.

Q. Did you make an investigation into his checking accounts at the bank as of that date?

A. Yes, sir.

Q. The Bank of Douglas as of December 31, 1945, did you show there what his balance was?

A. He had three accounts in that bank, had two checking accounts and one savings account. I did make those inquiries and I have them here and the balance for each account.

Q. As to the matter of the commercial account, how much did he have on deposit at that time?

Mr. Herring: Just a moment, your Honor. In the first place, it is quite apparent the question is addressed to the witness testifying from something

(Testimony of Lloyd M. Tucker.)

which is not in evidence at this time. He can, of course, elicit from the witness the answer concerning the inquiries he made and perhaps the result of the inquiry, but not by testifying from the exhibit. On that ground we object to it.

Mr. Peterson: This was prepared by you after your investigation, was it not?

A. Yes, it was prepared by Mr. Webb and myself.

Q. And prepared from the records of the bank?

A. Yes.

Q. And what records you could find of Mr. Calderon's? A. Yes.

The Court: I take it he is using the document for the purpose of refreshing his recollection. Objection overruled.

Q. You say there were two checking accounts in the Bank of Douglas? A. Yes, sir.

Q. What were they?

A. One was in the name of Mr. Calderon, which he used for one of his businesses; the other one was in his name doing business as the Coronado Cafe.

Q. And was there still another account?

A. Yes, sir, there was a savings account too.

Q. Now, December 31st, 1945, the beginning of 1946, how much was there on deposit in the bank in the commercial account of Edward B. Calderon?

Mr. Herring: Now then, your Honor, I ask the witness be instructed to answer that question on the basis of the exhibits in evidence. And I further

(Testimony of Lloyd M. Tucker.)

object on the ground the exhibits themselves are the best evidence and they have been put in evidence here by the Government; and that they are the best evidence and the only source of information by which this man could be guided.

Mr. Peterson: I think, your Honor, he stated he took [36] this Net Worth Statement from the records of the bank and from the various accounts of this defendant and from his own statements of the cash on hand he had and compiled this record here.

The Court: As to the Cash on Hand I understood him to say he got that information from Mr. Calderon. If he got this information from bank records, the bank records are of course the best evidence as to what was on hand at a particular time and we have the records in evidence.

Mr. Peterson: These records are in evidence here, they have been produced here in evidence. But you have to have a compilation of all these records to arrive at a Net Worth Statement. You can't put these in before a jury and arrive at some conclusion on it. There has to be some figure which was made out by the Internal Revenue Department as to what the result of all this shows.

The Court: Of course that is just a matter of summing up his testimony. Admittedly the witness is testifying as to what he learned from examination of the bank records and the records are here. The records will show the figure. The witness in making the statement or summing up the net worth, the witness can use the bank records.

(Testimony of Lloyd M. Tucker.)

Q. (By Mr. Peterson): In the case of Edward B. Calderon did you arrive at a Net Worth Statement after your investigation? A. Yes, sir.

Q. From the compilation made from the bank records and from [37] other sources from which you obtained information? A. Yes, sir.

Q. I think you stated that net worth was arrived at by giving the defendant here credit for his liabilities, his expenditures, and so forth and so on, in the compilation of that statement?

A. Yes, sir.

Q. What was the net worth at the end of 1945?

Mr. Herring: I object on the ground the proper foundation has not been laid.

The Court: Don't we have a stipulation regarding that?

Mr. Herring: We have a stipulation, your Honor, in regard to the items made by his investigation concerning all assets except Cash on Hand, Cash in the Banks, for the years 1945, '46, '47 and '48, I believe it is. Now then, this testimony here, the witness is asked to answer a question for which the proper foundation has not been laid in that **he has not yet established** the amount of Cash on Hand or amount Mr. Calderon told him he had on hand at the time. And until that is established there is abundant law to the effect that a Net Worth Statement cannot be admitted in evidence.

The Court: I believe the stipulation does except the Cash on Hand and Cash in the Bank. I believe that would have to be established prelimi-

(Testimony of Lloyd M. Tucker.)

narily, then the balance of the Net Worth Statement would be admissible under the stipulation.

Mr. Peterson: I didn't get that.

The Court: I believe you would have to establish by the witness the Cash on Hand and the Cash in the Bank since those are excepted from the stipulation. You may inquire about those and if those are established the balance of the Statement can be used.

Mr. Peterson: He has already testified here before this objection was made Mr. Calderon stated to him he had in each of these years \$500.00 Cash on Hand. That was where he started from.

The Court: There hasn't been any such testimony here today.

Mr. Peterson: Yes, sir.

The Court: I don't recall it.

Q. (By Mr. Peterson): Where did you receive the information for the Cash on Hand for each one of these years mentioned? Did that come from Mr. Calderon?

Mr. Herring: I object to that as leading and suggestive.

The Court: Yes, it is leading. Don't lead the witness.

Q. Where did you receive the information as to the Cash on Hand for each year?

A. From Mr. Calderon. He told me.

Q. How much did he tell you?

Mr. Herring: Now then, just a moment. I object to that until the proper foundation is laid. If

(Testimony of Lloyd M. Tucker.)

a conversation took [39] place between the witness and this gentleman there must be a proper foundation laid, persons present, time and place. I might further add, your Honor, that in the event it is an admission against interest in relation to this case it would not then be admissible until the corpus delicti has been proven.

The Court: The objection that the proper foundation has not been laid will be sustained. Let's fix the time and place and persons.

Q. Where were you when you questioned Mr. Calderon?

A. In the Post Office Building in Douglas, Arizona.

Q. Who was present with you?

A. Mr. Webb.

Q. Was that where you received the information you testified to here?

A. Yes, that was where we talked about it.

Q. And how much did he tell you he had in each one of these years?

Mr. Herring: Just a minute, your Honor. That is leading and suggesting. The conversation can be repeated at the time and place indicated. I didn't get the time; the place was indicated and not the time, I think.

The Court: The place and persons present was testified to.

Q. What time was that? [40]

A. It was June 18, 1950.

(Testimony of Lloyd M. Tucker.)

Q. And how much did he tell you he had in each one of these years?

Mr. Herring: I object to that. I think the conversation can be repeated and nothing else.

The Court: Let's have the conversation.

Q. State the conversation.

A. Well, at the time we asked Mr. Calderon many questions, as I recall. I asked him when he was born and where he was born and he showed me a Certificate of Naturalization. He showed me how many children he had, what their ages were, and I asked him how he operated his household, how much money he spent each month for personal living expenses. And I asked him how much cash he customarily carried about with him and he stated for many years it had been his habit to have cash on hand——

Mr. Herring: Just a moment, your Honor. I would like for the purpose of the record, so as not to be bothering all the time, to lay my foundation this way. I object to any further conversations between Mr. Calderon and this witness going to the investigation relating to this charge until the corpus delicti has been proven. Until it has, the proper foundation has not been laid to enter into any conversation with Mr. Calderon or relating any conversation concerning him.

The Court: Objection overruled. [41]

Mr. Herring: May the objection be a continuing one?

The Court: Very well.

(Testimony of Lloyd M. Tucker.)

Q. (By Mr. Peterson): From your investigation of the statements of Mr. Calderon how much did he have on hand in the checking account at the end of the year 1945?

Mr. Herring: I make the same objection I made heretofore. The witness was relating the conversation and I was sorry to interrupt but felt I had to. But certainly this question is improper since it calls for a conclusion and not in relation to the facts.

The Court: Yes, I think that last objection is well taken. I might say we haven't as yet covered the matter of Cash on Hand. I understood that was what we were starting out to do.

Mr. Peterson: The only way I see in this case is to take the statement of the defendant what money he had on hand. He couldn't go in his pocket and drag it out of there.

The Court: I think if there is any such evidence the witness ought to testify about any statement made to him by the defendant. We haven't reached that yet.

Mr. Peterson: Yes, your Honor, he has—I hate to disagree with your Honor—he has twice stated the man told him he had \$500.00 each year.

The Court: I don't recall it as yet.

Q. (By Mr. Peterson): Did Mr. Calderon during the conversation [42] you have described here, when Mr. Webb was present, and on the date you have described, did he tell you how much Cash on Hand he had at the end of 1945?

Mr. Herring: That is leading and suggestive.

(Testimony of Lloyd M. Tucker.)

The Court: He may answer.

A. He stated that at all times that it was customary for him to have cash on hand or in his pocket of about \$500.00.

Q. Did he say at that particular time he had \$500.00?

A. Yes, he did. And we were talking about year-end balances and he stated to the best of his recollection and belief he would have had \$500.00 on hand on the last day of each year. However, with respect to the year 1949 I pointed out to him that on January 4th of 1950 he made a deposit in his bank account of \$1,971.50. I asked him if it would be possible for him to accumulate that much cash between January 1 and January 4 and he stated it would not, it must have been some receipts carried over from the end of the year.

Q. Did he inform you how much he had in cash on hand at the end of 1946?

A. Yes, \$500.00.

Q. 1947? A. \$500.00.

Q. And 1948? A. \$500.00.

Q. And 1949? [43] A. \$1,971.50.

Q. Did you make an investigation into the accounts of the Coronado Cafe? A. Yes, sir.

Q. At the time that you were holding a conversation with Mr. Calderon, the time you have described, did he give you any information as to what amounts he had as cash on hand on the last day of 1945?

Mr. Herring: Could the question be directed to

(Testimony of Lloyd M. Tucker.)

the conversation, your Honor? I don't like to keep objecting.

The Court: I take it it is the same conversation. Is that true, Mr. Tucker?

Mr. Peterson: Yes, sir, I said the conversation which you previously described.

A. Yes, sir. Yes, he said he had \$500.00 on hand then.

Q. At that time did he tell you as to how much he had at the end of 1946 relative to cash on hand?

A. Yes, \$500.00.

Q. For 1947? A. \$500.00.

Q. And 1948? A. \$500.00.

Q. And 1949? A. \$1,971.50.

Q. At the time you held the conversation in the Post Office [44] Building in the presence of Mr. Webb and yourself did you question Mr. Calderon any on his savings account in the Bank of Douglas?

A. No, I don't believe we did.

Q. Did you arrive at a Net Worth Statement as to the worth of Edward B. Calderon for each of the years 1945, '46, '47, '48 and '49?

A. Yes, sir, I made that computation.

Q. Will you just explain that to the jury?

A. I beg your pardon?

Q. Will you explain that to the Court and the jury.

Mr. Herring: Now, before that is done I presume by that you mean, Mr. Peterson, he is to testify from the figures he made up?

Mr. Peterson: That is what you agreed to.

(Testimony of Lloyd M. Tucker.)

Mr. Herring: Is that the question you asked?

Mr. Peterson: Yes.

Mr. Herring: To that I object on the ground if he prepared a Net Worth Statement it is the best evidence, and if you have a Net Worth Statement he prepared let's put it in evidence, if it is admissible.

Mr. Flynn: May I call the Court's attention to the stipulation in which he stipulates this witness may testify from his report as to the total of the items going in to make up the assets and liabilities without producing the records. [45] The objection it is not the best evidence is not proper.

The Court: The witness may testify as to how he prepared the Net Worth Statement, if that is what counsel is asking him.

Q. (By Mr. Peterson): Will you proceed now and tell the Court and jury how you prepared this Net Worth Statement?

A. Yes. This Statement goes back to December 31st, 1943. I think we are concerned here with the period December 31, 1945. I have all of his known assets listed, his ownership of United States Treasury Bonds, merchandise inventory, his furniture and fixtures, his coin operated machines, automobiles, land and buildings, bank accounts and cash. I did that for each of the years 1946 through 1949, inclusive. On December 31st, 1945, we determined that his ownership of assets, his bank accounts, that he was worth \$32,000—

Mr. Herring: Just a moment. I object to that as not being responsive to the question. The question

(Testimony of Lloyd M. Tucker.)

was how he put together this Net Worth Statement, not as to the amounts in it. I don't believe that is in evidence yet.

The Court: He may use the amounts if he identifies the separate items.

Mr. Herring: Yes, but not the totals in which cash or cash on hand in banks could be reflected unless I can interrogate the man by voir dire first.

The Court: I think it should be stated by items showing [46] the source of each item.

A. (continuing) On December 31st, 1945, we determined he had cash on hand——

Mr. Herring: Just a moment. To that I object unless I be given a chance to cross examine this man on the conversation he said took place.

The Court: You may cross examine him at the proper time.

Mr. Herring: The point is, your Honor, this. That of course the items that go to make up this Net Worth Statement are based and have their basis and start with Cash on Hand and Cash in Banks. Unless that is correct the Net Worth Statement isn't worth anything because it starts on a false premise entirely. The question now is, he is to be allowed to testify from this thing without first laying the proper foundation to show the sources and correctness of his information to begin with. It is true he has related some conversation with Mr. Calderon. Due to the importance of this thing, if he is going to proceed this way I would like a chance to cross examine him first on voir dire with

(Testimony of Lloyd M. Tucker.)

relation to the very basis of this thing. Now if it can be established, there is nothing wrong in that; if it can't be established and the examination and insecurity or unreliability of the exhibit is shown, it shouldn't be testified from at all.

Mr. Peterson: The only discussion that was entered into, from this witness' testimony at this time, relative to the [47] amount of cash on hand, that was all. The other records upon which he based his net worth are here already in evidence.

The Court: That is very true. I think we are not too far apart, but I think if the witness would testify as to what items he has and the source of the item, in other words, upon what he bases the item, his source for putting that item down, then I don't think you have any difficulty.

Mr. Peterson: With that he is to go into his liabilities and assets and he has to give figures for each year, which Mr. Herring objects to.

The Court: No, I don't think there can be an objection if he gives the sources as he goes along. If he has an item of Cash on Hand on the Net Worth Statement, let him say on what he bases that item. Same way with Cash in the Bank.

Q. (By Mr. Peterson): Did you arrive at a figure of net worth of this defendant on the end of the year 1945? A. Yes, sir.

Q. Upon what did you base that figure?

A. All right, Cash on Hand \$500.00; Cash in the Bank of Douglas checking account of \$688.91; Cash in the Bank of Douglas checking account for

(Testimony of Lloyd M. Tucker.)

the Coronado Cafe \$96.96; Cash in the savings account in the Bank of Douglas \$4,102.77; United States Treasury Bonds of \$5,181.25; Merchandise Inventory \$1,076.60; Furniture and Fixtures \$944.00; Coin Operated Machines \$8,071.00; Automobiles \$1,855.00; Land \$2,300.00 and [48] Buildings \$8,140.00. The total of those items——

Mr. Herring: Now, just a minute. I object to that on the ground the proper foundation has not been laid for stating the total inasmuch as the witness' statement conflicts with Exhibit No. 7, I believe it is already in evidence; the bank records and this man's statement of cash don't jibe by his own testimony.

The Court: The objection will be overruled.

A. (continuing) The total of those items I just related is \$32,956.49. Now, Mr. Calderon had some liabilities. He had depreciation reserve for furniture and fixtures which we allowed him of \$108.07; he had depreciation reserve we allowed him on his coin machines of \$5,145.72; depreciation on automobiles \$431.10; depreciation on buildings of \$1,221.54. A total of those liabilities is \$6,906.43. Those were subtracted from the assets, leaving a net worth on that date, December 31, 1945——

Mr. Herring: Now, just a moment, please. May my same objection go to this statement.

The Court: Very well.

A. (continuing) ——of \$26,050.06. In addition to that there were living expenses of \$3,000.00 added. There was an item of an automobile purchased for his father of \$200.00. There were doctor

(Testimony of Lloyd M. Tucker.)

and hospital bills paid of \$106.50. State of Arizona income tax was paid of \$31.78 and Federal income [49] taxes paid of \$164.64. Shall I continue?

Q. Yes. Will you give the figures at the end of the year 1946, what you arrived at them from, and the basis of your compilation of the net worth and subtraction of the liabilities.

Mr. Herring: May the record show my continuing objection on the ground the proper foundation has not been laid and the error is manifest already?

The Court: The record may show the same objection.

A. Do you want me to enumerate the individual items again?

Q. For 1946, on which you base your figures.

A. On December 31, 1946, Cash on Hand item remains at \$500.00; Bank of Douglas checking account—

The Court: Just a moment, Mr. Tucker. On those items will you tell us, please, the source of them, where you get the \$500.00, where you get any other figure in there. Otherwise there is no way of knowing where they come from.

A. Cash on Hand \$500.00 was taken from Mr. Calderon's statement that he had \$500.00 cash at that time. The Bank of Douglas checking account showed that he had \$1,879.09 in that account and that was taken from the examination of the Bank of Douglas records. In his second checking account at the Bank of Douglas it showed at the end of 1946 he had \$847.53. In his savings account he had

(Testimony of Lloyd M. Tucker.)

\$6,970.44. Both of those items were taken from an examination of the bank's records. His ownership of United States Treasury Bonds was \$5,181.25; that [50] was taken from an examination of the bonds themselves. The Merchandise Inventory was \$1,847.91 and that was obtained through the return which he filed for that year, plus examination of some working papers that were furnished by Mr. Verdago. Furniture and Fixtures which he owned at the end of 1946 was \$1,394.00 and that figure likewise was taken from the return and an examination of some working papers which had been used to prepare the return. The Coin Operated Machines at the end of 1946 is \$24,055.63; that information was obtained from examination of Mr. Calderon's paid checks, examination of some invoices furnished by him, and an investigation of records maintained by various coin operated amusement companies located in various parts of the United States. The ownership of Automobiles was the same as the previous year, \$1,855.00, and that was obtained in part with respect to one automobile which Mr. Calderon owned, the cost of that was taken from his statement and there was another automobile, I believe a truck, and that was taken from the records of one of the automobile companies in Douglas, I don't recall the name right now. The Land, item of Land, was \$2,600.00 and Buildings \$10,943.49. Those two items were taken from an investigation of the County records in Cochise County, from examination of bank records, from certain deeds which Mr.

(Testimony of Lloyd M. Tucker.)

Calderon produced. The total of those figures is \$58,075.34. The Accounts Payable at the end of 1946, \$1,027.44. That figure was determined by [51] an investigation of records of coin operated amusement device companies and their records showed that at the end of the year certain equipment wasn't fully paid for. The depreciation reserve for furniture and fixtures was \$239.97; for coin operated machines \$7,364.12; for automobiles \$506.60; for buildings \$1,624.66. His depreciation was computed in accordance with Internal Revenue regulations, which permit any individual to deduct the cost of property he owns over a certain number of years, and that he should be given credit for that and it should be subtracted from his assets. We did that in this case. We determined that as of the end of 1946 he had liabilities of \$10,762.79. His net worth at the end of 1946, \$47,312.55. Living expenses were the same, \$3,000.00.

We had a conversation with Mr. Calderon on June 18 of 1950 and he stated that——

Q. Who was there?

A. Mr. Webb was there. The conversation took place in the Post Office Building in Douglas. And we questioned Mr. Calderon about the amounts of money he customarily spent for living expenses to maintain himself and family. He stated for many years it had been his custom to regularly give his wife two hundred fifty dollars in cash each month to be used for household expenses and other personal expenses.

(Testimony of Lloyd M. Tucker.)

Mr. Herring: Same objection, to any statement made by Mr. Calderon in relation to these conversations which might be [52] used in this case. The foundation has not been laid, there is no corpus delicti proven.

The Court: Objection overruled.

A. (continuing) In addition to the living expenses, in 1946 Mr. Calderon stated that he spent four hundred dollars for vacation which he took that year. Examination of his paid checks disclosed that he paid seven dollars for medical expenses and in that year one hundred eighty-six dollars federal income taxes paid. Now, for the other years, Mr. Peterson, the source of material would be exactly the same. May I identify the amounts and without explaining the source? The source will be the same.

Q. I think in order to satisfy Mr. Herring I think you had better explain where you got it for each year.

Mr. Herring: On Mr. Tucker's avowal the source is exactly the same, except for my previous objections he can go ahead and give the amounts without giving the source, as far as I am concerned.

The Court: Very well.

A. Cash on Hand as of December 31, 1947, was \$500.00. The Bank of Douglas checking account for Mr. Calderon and his wife was \$1,713.78. The checking account for the Coronado Cafe had a balance of \$270.07. For the savings account in the Bank of Douglas there was a year-end balance of \$4,086.51. United States Treasury Bonds which he had at the end of the [53] year 1947 was \$5,181.25.

(Testimony of Lloyd M. Tucker.)

Merchandise Inventory was \$3,820.68. Furniture and Fixtures \$2,075.09. Coin Operated Amusement Machines \$31,945.95. Automobiles \$1,855.00. Land \$3,100.00 and Buildings \$18,643.49. The total of those items is \$73,191.22.

The depreciation reserve to which he was entitled at the end of that year: for Furniture and Fixtures was \$2,882.46—I am sorry, the Accounts Payable were \$2,882.46—the depreciation reserve for Furniture and Fixtures \$463.96; on Coin Machines \$12,274.96; for Automobiles \$581.10; for Buildings \$2,254.08. The total of the liabilities at the end of 1947 was \$18,456.56. Spent for vacation in that year was the sum of \$543.71; for doctor and hospital bills \$91.00.

On December 31, 1948, Cash on Hand was \$500.00. Cash in the Bank of Douglas checking account \$386.36. And in the second checking account \$162.32. Cash in the Bank of Douglas savings account was \$6,637.07. During the year 1948 Mr. Calderon opened a savings account at the Valley Bank in Douglas and examination of the bank's records disclosed he had a year-end balance in that account of \$762.08. United States Treasury Bonds were held by him on that date in the amount of \$5,181.25. Merchandise Inventory was \$3,090.50. Furniture and Fixtures, \$2,148.45. Ownership of Coin Machines \$40,224.10. Automobiles remained the same, \$1,855.00. Land \$3,100.00. Buildings \$18,643.49. Total assets \$82,692.62. [54]

Accounts Payable at the end of that year were

(Testimony of Lloyd M. Tucker.)

\$1,625.02. Depreciation Reserve: for Furniture and Fixtures was \$727.76; depreciation reserve for Coin Machines \$18,302.33; for Automobiles \$656.60; Buildings \$3,911.82. Total liabilities \$24,323.53. Insurance Premiums paid that year, determined from examination of Mr. Calderon's paid checks, was \$200.00. Money spent for doctor bills was \$40.00.

At the end of 1949 Cash on Hand \$1,971.50. In the Bank of Douglas checking account there was \$891.59—

Mr. Herring: Excuse me, what year is this?

The Witness: This is the end of 1949.

Mr. Herring: Beginning of 1950?

The Witness: Yes, \$891.59 in the Bank of Douglas checking account. There was for the Coronado Cafe \$13.60. In the savings account in the Bank of Douglas we have on this statement \$18,034.24. Information which was obtained subsequent to the preparation of this statement discloses that there was a withdrawal made.

Q. And the correct balance should be?

A. \$17,334.24.

Mr. Herring: Now, just a moment. That information you are talking about there, does that appear on the statement you are reading from?

The Witness: Yes, the figure \$18,034.24 appears here.

Mr. Herring: That is right, and the other information [55] that caused you to change that came from me, didn't it?

The Witness: No.

(Testimony of Lloyd M. Tucker.)

Mr. Herring: It didn't?

Q. Go ahead with your statement, we will get to that in a moment.

A. The balance in the Valley National Bank savings account was \$1,776.92. Ownership of United States Treasury Bonds at the end of 1949 was \$6,181.25. Merchandise Inventory was \$4,331.96. Furniture and Fixtures \$2,148.45. Ownership of Coin Operated Machines was \$45,626.44. Ownership of Automobiles was \$2,519.21. Ownership of Land \$3,300.00. Buildings \$19,143.49. Total assets shown by this Net Worth Statement \$105,938.65.

The Accounts Payable at the end of 1949 were \$300.00. The Depreciation Reserve: for Furniture and Fixtures was \$995.23; for Coin Machines \$25,660.46; for Automobiles \$94.61; for Buildings \$3,772.90. Or a total of \$30,823.20. In addition to that there were Insurance Premiums paid \$172.69. Money spent for doctor and hospital bills of \$275.00. And State of Arizona income taxes \$12.68.

The Court: We will take the afternoon recess at this time.

Ladies and gentlemen, we will now stand at recess for fifteen minutes. During the recess please bear in mind the admonition given you. [56]

(Recess.)

The Court: You may proceed.

Q. (By Mr. Peterson): Mr. Tucker, in arriving at the computation of the tax in the years of 1946, '47, '48, and '49 what figures did you use for the computations of that tax?

(Testimony of Lloyd M. Tucker.)

A. I am looking for that, Mr. Peterson. It has gotten away from me momentarily here. Took the net worth as of the end of each year and the net worth as of the end of each succeeding year and the difference for each interim calendar year was the increase in net worth. That was determined to be the corrected income. From that he was given, Mr. Calderon was given, credit for the income which he reported.

Q. Was there any income tax reported by Mr. Calderon in 1946, '47, '48 and '49?

A. No, sir, none.

Mr. Herring: Are you talking about a return being filed or tax paid?

Mr. Flynn: Tax.

Mr. Peterson: Tax paid.

Mr. Herring: There was no question but what a return was filed?

Mr. Peterson: No, it is right here in evidence. There was no tax paid was the question I asked.

Mr. Herring: All right.

Q. (By Mr. Peterson): I hand you Government's Exhibit 7 for [57] identification and call your attention to the item \$700.00 on this exhibit, which is a bank record of the Bank of Douglas, Arizona. Was that \$700.00 in error, Mr. Tucker?

A. Sir?

Q. Was that an error?

Mr. Herring: Just a moment, please. First of all, what exhibit are you speaking about?

(Testimony of Lloyd M. Tucker.)

Mr. Peterson: I said Exhibit 7, being the Bank of Douglas records.

Mr. Herring: Okay. Now then, the exhibit is in evidence as being a verified statement of the bank records and bank accounts and purports, has been admitted to represent what it was put in for. Is your attempt to impeach the exhibit? I object to it on that ground.

Mr. Peterson: I haven't completed my examination yet.

The Court: You may proceed.

The Witness: Will you repeat the question, please?

Q. Was that an error in the compilation between your record and the record of the bank?

A. Yes. This certified copy of this ledger sheet from the Bank of Douglas shows a \$700.00 withdrawal on November 4th, 1949.

Q. Did you later deduct that from your figures, Mr. Tucker?

A. Yes, sir, I did.

Q. In compiling a new tax? [58]

A. Yes.

Q. Were there any other discrepancies between the bank's records and your figures, Mr. Tucker?

A. Yes, sir, there were two.

Q. What were those?

A. In the Bank of Douglas checking account for Mr. Calderon on December 31st, 1945, the ledger sheet shows a balance on December 31st, 1945, of \$688.91. And after that date there are shown one withdrawal for \$5.00 and two deposits for \$5.00, and all of them have been crossed out. They then show

(Testimony of Lloyd M. Tucker.)

a new balance of \$693.91 which is \$5.00 in excess of what I show. One of these deposits should not have been crossed out, it should have been shown there without being crossed out. So accordingly I used the figure of \$688.91 instead of the correct figure of \$693.91, made a \$5.00 error there. I had one other discrepancy in that same account. At the end of the year 1947 I show a December 31st balance of \$1,713.78 as does the bank; however on December 31st some three other checks came in later on that date and a new balance is carried out of \$1,665.64. That is the balance ' should have taken. There is \$48.24 difference there.

Q. Did you compile, and the other Internal Revenue agents, mainly yourself, compile the amount of tax which was due from Mr. Calderon for the years 1946, 1947, '48 and '49, which compilation was made from the net worth figures? [59]

A. No, I didn't make that compilation, Mr. Webb did, he determined that.

Mr. Peterson: That is all.

Cross Examination

Q. (By Mr. Herring): Mr. Tucker, have you told us all the inaccuracies there are in this Net Worth Statement?

A. Yes, as far as I know those are all there are.

Q. How about the State of Arizona income tax payment?

A. What would you like to know about it, sir?

Q. Well, it appears to me you have added that

(Testimony of Lloyd M. Tucker.)

to determine his net worth instead of subtracting it.

A. Well, I can answer your question by saying it was not added to his net worth, it was added after his net worth had been determined, as an expenditure.

Q. And it should have been deducted?

A. No, it shouldn't have been.

Q. Isn't the State of Arizona income tax, income tax paid, a deductible item?

A. It is a deductible item in determining the tax due, yes.

Q. Then why is it added in your compilation here?

A. He was given credit for that at the time his tax was computed.

Q. Now, Mr. Tucker, then the net taxable income as shown by your Net Worth Statement is wrong, isn't it? [60]

A. By this Statement you are looking at?

Q. Yes.

A. \$5.00 wrong one year and \$40 some the other year and \$700.00 in one other year.

Q. And also it would be wrong by the amount of State income tax paid? A. Yes.

Q. \$3.06 in one year, \$31.78 another year, and \$12.68 in the last year?

A. No, that is all right to have it in there.

Q. Then this Net Worth Statement you have in front of you, when you prepared it originally, was in error, wasn't it?

A. Yes, by the amounts I enumerated.

(Testimony of Lloyd M. Tucker.)

Q. Do you recall when you came in here and testified when this case was tried before?

A. Oh, yes.

Q. Do you remember at that time telling Mr. Peterson in answer to a direct question on the direct examination that that Net Worth Statement was based on absolute fact and it was not in error?

A. Frankly I don't remember using those words. If the record says I did, I don't dispute it. I do recall saying in effect it was a correct Statement.

Q. It was absolutely accurate, you said?

A. I don't remember saying that. [61]

Q. Mr. Tucker, you didn't learn then it wasn't an accurate Statement until I interrogated you on cross examination and pointed it out, did you?

A. Yes, sir, I learned it before then.

Q. Did you? A. Yes, sir.

Q. Then if you knew it was inaccurate why on direct examination before did you tell the Court and jury at the very beginning it was accurate and based on fact?

A. I believed it was accurate.

Q. When in the course of that proceeding did you find out it wasn't?

A. When Mr. Hampel from the Bank of Douglas introduced into evidence those deposit slips and withdrawal slips and bank statements.

Q. You found out you were about seven or eight hundred dollars off in 1949 and forty or fifty dollars off on several other years on the very basic figures on which this Statement is based?

(Testimony of Lloyd M. Tucker.)

A. To answer your question specifically, I found out I was \$700.00 off in one year——

Q. Yes.

A. ——and in 1945 I was off \$5.00. And this other year, I think 1947, I was off \$40 some.

Q. And all those errors you were off because you made a [62] mistake in examining bank records? A. No, sir.

Q. The bank made the mistake?

A. Are you asking me a question?

Q. Yes. Who made the mistake? You or the bank?

A. The record I examined with respect to the \$700.00 withdrawal did not incorporate that withdrawal. The other mistakes, the \$40 mistake was purely a mistake of mine, there was no question about that.

Q. The little one was and the big one wasn't a mistake of yours, is that what you intending to say?

A. I say the record I examined did not show the \$700.00 withdrawal.

Q. You mean Mr. Hampel changed it afterwards? A. I didn't say that, sir.

Q. When did you examine these records?

A. June 1950.

Q. So the balances as of the end of 1949 were there on the record, weren't they?

A. The record at the end of 1949 that I examined I am quite confident is exactly the same as I have shown on this report. However, I do know

(Testimony of Lloyd M. Tucker.)

the withdrawal was made. I merely say it was not taken into account on the bank record.

Q. In other words, you made a mistake and you are trying to cover up for it a little bit, Mr. Tucker?

A. That wasn't my statement.

Q. Let's get back to this Net Worth Statement. A Net Worth Statement must be based on several facts, mustn't it, to be accurate? Is that right?

A. Yes, that is true.

Q. And one of those facts is the Cash on Hand, isn't that true? A. Yes, that is true.

Q. For instance, at the beginning of 1945 if Mr. Calderon, you say here he had \$500.00 on hand?

A. Yes.

Q. \$500.00 cash on hand. Now, if instead of that he had \$10,000 cash on hand the whole computation on this year and succeeding years is in error, isn't it? A. Yes, I suppose so.

Q. Do you recall when you testified in this previous hearing, before we get into this Cash on Hand any deeper, that the question was asked you—

Mr. Flynn: Would you give me the page?

Mr. Herring: Page 37, bottom of the page, line 20.

"Question: Was there anything else?" by me to you.

"Answer: Yes, sir. On this schedule—" referring to your Net Worth Statement—"there is an item entitled 'State of Arizona Income Tax Paid in 1949' in the amount of \$12.68, which it is my opinion

(Testimony of Lloyd M. Tucker.)

should be deleted from the Statement [64] for the reason that the State of Arizona income tax paid are deductible expense on federal income tax returns.

“Question: And can be deducted?”

“Answer: Yes, sir, should not be in the Statement.”

Were those questions asked and you made those answers?

A. Yes, I remember that very clearly.

Q. Now, let's get back to this Statement. You said, as I understand it, that if the Cash on Hand item as it appears in your Net Worth Statement is in error then the whole thing is in error, that is right, isn't it?

A. It would affect it, yes. It wouldn't make any of the other items wrong or right.

Q. Just make the totals wrong all the way through? A. Yes, if the item was wrong.

Q. The total taxes, the total amounts Mr. Calderon is to be charged with would be wrong all the way through? It is true, isn't it? A. Yes, sir.

Q. Do you recall when you appeared on the trial of this case before you referred to some notes you had made to come to trial with?

A. Yes, sir.

Q. You had made those notes, I think, in relation to some other notes you had and a report you made, is that correct? A. That is true. [65]

Q. You made those typewritten notes for the purpose of refreshing your memory when you came

(Testimony of Lloyd M. Tucker.)

to trial, is that right? A. Yes, sir.

Q. Mr. Tucker, before we go any further than that, isn't it true that when you talked to Mr. Calderon about the amount of cash he had on hand that he told you he ordinarily carried around \$500.00 in his pocket? Is that right? A. That is true.

Q. And as a matter of fact, you didn't ask him how much cash he carried in his business, did you?

A. Yes, we did.

Q. You did. Do you recall asking Mr. Verdugo, who was his accountant, how much cash Mr. Calderon ordinarily had and if it wasn't true, and Mr. Verdugo told you that it was his custom, Mr. Calderon's, to have large amounts of cash in his safe? Do you recall that?

A. I am not quite sure. I remember that he said that he made fairly regular deposits at widely spaced intervals in which he deposited large amounts in his bank account, I remember that. And I remember some discussion about Mr. Calderon having a safe in his office but I don't remember the conversation I had with Mr. Verdugo about that.

Q. As a matter of fact, you related here in answer to Mr. K. Berry Peterson's question a conversation with Mr. Calderon in which you said that he had cash on hand ordinarily of about [66] \$500.00. Actually what Mr. Calderon said was he ordinarily carried that much in his pocket, didn't he? A. Yes, he said that.

Q. He didn't say anything about having \$500.00 cash on hand, that was your assumption, wasn't it?

(Testimony of Lloyd M. Tucker.)

A. That was cash on hand, was what I said.

Q. I want to hand you these typewritten notes you came to Court with last time. Are those the notes you made in preparation for this trial?

A. Yes, sir.

^ Mr. Herring: I offer them in evidence. May they be marked for identification first.

(Defendant's Exhibit A marked for identification.)

Mr. Herring: May the record show this Defendant's Exhibit A is the notes the witness identified he made preparatory to coming to trial the last time for the purpose of refreshing his memory. I offer those notes in evidence.

Mr. Peterson: We object to the admission of this evidence. It is merely the notes of this witness which have been jotted down, are not binding upon either himself or anybody else and it is improper cross examination.

The Court: May I see them?

Mr. Herring: Yes, sir.

(Defendant's Exhibit A handed to the Court.)

The Court: Objection overruled. It may be admitted. [67]

(Defendant's Exhibit A in evidence.)

Q. (By Mr. Herring): Now, I want to read to you, to refresh your recollection, something from this exhibit you have typed in here. First, you say "On June 27, 1950, at 3:55 p.m. in Room 213 United States Post Office Building, Douglas, Arizona, Spe-

(Testimony of Lloyd M. Tucker.)

cial Agent Lloyd M. Tucker and Deputy Collector Rex E. Webb held a conference with Edward B. Calderon. A Memorandum of Interview was prepared and signed by the Government officers following that interview and is a part of the Government's file. During that conference Mr. Calderon made the following statement.

"On January 1, 1944, he had approximately \$500.00 cash in his pocket. He believes that because it is his habit to carry about that much money in his pocket at all times. He made a deposit to his savings account at the Bank of Douglas on January 4, 1950, of approximately \$1,900.00. That sum represented money which he had accumulated during the last month or so of the year 1949'."

That is what you said in your notes of that conversation, isn't it? A. Yes, that is right.

Q. And that reminder to you which is incorporated in this typewritten statement was made from a report which you made to the Government immediately at the time of that conversation, wasn't it? [68]

A. Not exactly. It was something I prepared for my own information.

Q. But you had notes which you had taken immediately after this conversation? A. Yes.

Q. And from that you took these typewritten notes, is that correct?

A. Yes, that is right.

Q. Now, Mr. Calderon had been in the music machine business and coin-operated machine busi-

(Testimony of Lloyd M. Tucker.)

ness for a good many years before you interrogated him in 1950, hadn't he?

A. Yes, I believe that he had.

Q. You discovered in the course of your investigation he had been in the music machine business since about 1946 or a little before?

A. Yes, that is right.

Q. And that he had operated the same business in Douglas between 1941 through 1945, which were the war years, is that right?

A. Yes, that is true.

Q. You knew that? A. Oh, yes.

Q. You also in the course of your investigation determined that there was an Air Base at Douglas and business conditions were good there, between 1942 and 1946, let's say, didn't you? [69]

A. Yes. Yes, I think that is true. I didn't make an investigation of it but from hearsay I gathered things were booming down there.

Q. You also knew at the beginning of 1945, let's say, he had not been able to buy machines since 1942, had he, buy new ones, you knew that?

A. Yes, I knew that.

Q. You had investigated other coin operated businesses before, I think, haven't you?

A. Yes.

Q. So that you had every reason to know that he very probably had a good deal more cash than \$500.00 on hand at the beginning of 1946, didn't he?

A. No, Mr. Herring. No, I didn't know that.

Q. I see. Now, you had examined what is here,

(Testimony of Lloyd M. Tucker.)

Government's Exhibit 7 which is the bank account in the Bank of Douglas, the savings account, do you recall that? A. Yes, sir.

Q. Then you knew he hadn't deposited anything in that account since between June of 1943 and October 1945, didn't you?

A. I would have to look at the record. I heard it stated here on the stand today.

Q. You examined that record at the time, didn't you? A. Yes. [70]

Q. You knew that fact then, didn't you, when you talked to him? A. Yes, I knew it then.

Q. You had examined his other bank accounts?

A. As far as I know I examined all of them.

Q. Knowing that he had not deposited any money in his savings account in that period and that his deposits in his other accounts were about the same as they had always been, weren't they?

A. Yes, I believe so.

Q. You also knew he worked at the smelter during 1943, didn't you? A. Yes.

Q. And you knew he had rental property in Douglas? A. Yes.

Q. And where then did you suppose he put his money he got from operating these coin machines and from his businesses if he didn't put it in his savings account where he put it before?

A. He spent five thousand dollars of it for bonds. He put four thousand dollars in his savings account. And he bought eight thousand dollars worth of machines. And he had land and buildings

(Testimony of Lloyd M. Tucker.)

worth ten thousand dollars at the end of 1945?

Q. He bought the bonds in 1944?

A. You were talking about this period during the war. Yes, [71] he bought some of them prior to 1943 or in 1943, at least most of them in 1944.

Q. That is right. Actually, you don't know how much cash—that \$500.00 is just an assumption, isn't it?

A. It is based on what he told me.

Q. You didn't even ask him how much money he had at home in the safe?

A. We discussed this cash item at some length.

Q. Can you under oath say that you asked him how much money he ordinarily kept in his safe and had in his safe on January 1, 1945?

A. No, I can't say I asked him that question.

Q. In fact, these notes here on this exhibit is just about all he said about that, isn't it?

A. No, that is not quite right. This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times. It is obvious that he had more cash at times because his savings account shows he deposited one thousand or two thousand or more at a time, so it is evident he had it the day before he deposited it and probably for days or weeks before. Of course at times he had more cash than that.

Q. It is entirely possible, from your knowledge of the circumstances in Douglas and from your knowledge of the music machine and coin machine business and from your investigation [72] of this

(Testimony of Lloyd M. Tucker.)

thing, that Mr. Calderon had as much as ten thousand dollars in his possession on January 1, 1945, isn't it? It is possible?

A. Well, it is possible he could or could not have had it. I can't answer the question, Mr. Herring.

Q. You don't know?

A. All I know is what he told me he customarily had.

Q. In his pocket, five hundred dollars?

A. He said in his pocket.

Q. Didn't Mr. Verdugo tell you Mr. Calderon kept cash in his safe?

A. You asked me that question before and I am trying to remember. I can't be sure. I seem to recall some discussion about it.

Q. Do you recall at the previous trial this question was asked and you made this answer—bottom of page 75 and top of page 76:

“Question: Didn't Mr. Verdugo tell you that Mr. Calderon kept cash in his safe?

“Answer: Yes, Mr. Calderon told me that too.”

That question was asked and you made that answer?

A. Oh, yes, that is my answer if the record shows that. My recollection was evidently better then.

Q. Yet each year here on this Statement you put in Mr. Calderon had cash in his pocket, five hundred dollars, no more, [73] no less, don't you?

A. That is what I said.

(Testimony of Lloyd M. Tucker.)

Q. Now, also you had Mr. Calderon sign a Net Worth Statement, didn't you? A. Yes, sir.

Q. As a matter of fact, at the time he signed it he talked to you and he asked his accountant about it, Mr. Verdugo, then he turned to you and said, "Is that right?" and you said "Yes," and he signed it, isn't that right?

A. To some extent. He called Mr. Verdugo over and he asked him if he thought that statement were correct; Mr. Verdugo read it and he said, "I don't know about all the figures on it but it is a commonly used method of determining income and it looks all right to me."

Q. So you told him the figures in them were checked and he signed it?

A. I would like to preface that by saying we spent most of the day with him and went over with him a good deal of the source of material from which that statement was compiled and checked it. In fact, he furnished us with a good many of the invoices that relate to the purchase of that machinery.

Q. He cooperated with you fully?

A. Yes. He furnished me with a good deal of information.

Q. When you went down to Douglas and started this investigation Mr. Calderon was very anxious to please you and to do [74] anything that would assist you in this investigation?

Mr. Peterson: I don't think that has anything to do with this case.

(Testimony of Lloyd M. Tucker.)

Mr. Herring: Of course, your Honor, it goes to intent. It is the very basis of the case.

The Court: He may answer if he knows.

A. Your question was, was he anxious?

Q. He cooperated with you in every way and got you any information you requested?

A. Yes, anything we asked him for—I wouldn't say anything we asked him for, we asked him for all his invoices and he didn't produce them. He produced some. They may or may not be all he had. He did produce invoices. He produced his paid checks.

Q. And he made both himself and Mr. Verdugo available to you anytime you wanted to talk to him, didn't he?

A. Yes, that is true.

Q. He exhibited the greatest cooperation on anything you wanted him to do, didn't he?

A. Yes, I would say he was cooperative.

Q. Now then, I noticed in testifying about the various items that go to make up this Net Worth Statement that you didn't ever refer to Mr. Calderon's books as a source of material here. That was because those books were so fragmentary as to be almost non-existent, weren't they? [75]

A. I think I referred to it in one instance here with respect to the inventories.

Q. But other than that you found many instances where invoices had not been entered, didn't you?

A. Oh, yes. Yes.

Q. You found other instances in which invoices had been paid and never credited properly?

(Testimony of Lloyd M. Tucker.)

A. I don't recall about that.

Q. In fact, the books themselves were incomplete, weren't they, very incomplete?

Mr. Peterson: Your Honor, I don't think this is a matter of defense. It is a matter he didn't keep books. The law provides he should keep books. It is no defense that he didn't keep them.

The Court: Your objection is overruled. It is something that this witness knows in his investigation. He may answer.

A. The books, for a small business, were set up in an acceptable form. They provided for purchases and income, purchases of capital equipment. There was no fault to find with that. There were many omissions in those books. A good deal of these coin operated machines were not recorded in the books.

Q. In other words, the keeping of the books, there was some sort of lag or difficulty between the original sources of information and the books themselves? In other words, they [76] didn't jibe very well?

A. That is true.

Q. And sometimes the books were inaccurate even as far as they went?

A. There were, as I recall, there were no mathematical errors. There may have been some small ones. The thing was handled right. But there were lots of things left out.

Q. Lots of things left out. You don't claim here that there was any fraud in any deductions Mr. Calderon claimed, do you, that the Government later disallowed or you claim were not allowable?

(Testimony of Lloyd M. Tucker.)

A. No, I believe not.

Q. Is it just a matter in one or two instances he claimed deductions which you decided weren't allowable under the rules of the Treasury Department, is that it?

A. Are you referring to the whole matter?

Q. Yes. I am trying to find out—he is not charged here, you don't claim he attempted any fraud by any deductions or anything he put in?

A. No, not by false deductions.

Q. How many conversations did you have with Mr. Calderon? A. About four.

Q. In how many of them was Mr. Verdugo present? A. At two.

Q. So you had two conversations — was Mr. Webb present all [77] the time?

A. He was present at three of them.

Q. And you had one conversation then just between you and Mr. Calderon?

A. No, Mr. Verdugo was there.

Q. Mr. Verdugo was there that time?

A. Yes.

Q. At any one of these conversations did you have Mr. Calderon sign a statement, written statement? A. Yes, two statements.

Q. Now I notice from this Net Worth Statement you prepared here that in 1946 you say Mr. Calderon increased or bought his machine equipment or increased it about sixteen thousand dollars, didn't he? A. Yes, sir.

Q. How much did he increase his Notes or Ac-

(Testimony of Lloyd M. Tucker.)

counts Payable during that same time?

A. By one thousand twenty-seven dollars and forty-four cents.

Q. So that left fifteen thousand dollars in cash he got from somewhere, didn't it, approximately?

A. About, yes, about fifteen thousand.

Q. Yet at the beginning of that year you show he only had five hundred dollars in cash?

A. Yes, sir.

Q. Where did the money come from? [78]

A. Some of the purchases were paid for in cash and some were paid for on his checking account.

Q. Yes. How many were paid for from his checking account?

A. I can't tell you by number without looking.

Q. What I am getting at, Mr. Tucker, the cash items were paid for out of cash, much of which he must have had on hand at the beginning of 1946, weren't they?

A. You are asking me to assume that they were?

Q. Yes.

A. The examination I made does not indicate that would be the case.

Q. Let's stop a minute and see. Let me recall something to you. We agreed a while ago for 1942 to 1945 were the good business years in Douglas, do you recall?

A. Yes, I guess we agreed on that. I wasn't there but I heard that.

Q. We further agreed that he didn't make any deposits in his savings account from June 1943 to

(Testimony of Lloyd M. Tucker.)

October 1945, remember? A. Yes, sir.

Q. We also agreed during the period before 1946 for a period of about three and a half years - he was unable to buy any machines, remember?

A. Yes, sir.

Q. Now, then, if he paid out during 1946 about fifteen thousand dollars, either out of his checking account or by [79] cash for new equipment, he must have had more than five hundred dollars in cash when he went into the year, mustn't he?

Mr. Peterson: That is argumentative. It has been asked and re-asked, purely argument.

The Court: He may answer if he knows.

A. Will you restate the question?

(Last question read.)

A. No, I don't think that follows, Mr. Herring.

Q. Isn't it a reasonable assumption that is so?

A. I don't think it is, if you permit me to continue.

Q. Your answer is it isn't a reasonable assumption?
A. No.

Q. Do you have a record of coin operated machine purchases in 1946?

A. Yes, sir, I think I have another copy of that. Do you want me to refer to that?

Q. Would you get it, yes.

(Witness refers to document.)

Q. Do you have it before you now?

A. Yes, sir.

Q. He paid \$1,195.00 by check on February 6?

A. Yes, sir.

(Testimony of Lloyd M. Tucker.)

Q. Then on March 22 he paid \$50.00 cash deposit; on March 28th he paid—we will just pick up the cash payments here— [80] on April 15 he paid \$180.00 in cash; on May 21 he paid \$50.00 by cash; on July 8 he paid \$50.00 by cash; on August 7 he paid \$100.00 by cash; and the balance of \$1,660.00 by cash payable to the Valley National Bank by buying a sight draft. On September 4th he paid \$1,965.54 in cash; on September 13th he paid another \$50.00 by cash; on October 7 he paid \$50.00 by cash; and an additional \$199.20 by sight draft to the Valley Bank in cash; on October 24 he paid \$149.00 in cash; on November 26th another \$50.00 by cash, and on November 26 another \$50.00 by cash; on December 13 another \$60.00 by cash; on December 26th \$203.75 by cash. All those are correct, aren't they?

A. All except the last one, that was paid by cash on January 7th.

Q. January 7, 1947?

A. Yes, you are right.

Q. During this same period of time he made regular deposits of cash in his checking account?

A. Yes, sir.

Q. And in 1946 he made regular deposits of cash in his savings account?

A. Well, yes, he made some.

Q. Yes. On December 13th there was a check drawn to the Wolf Sales Company of \$1,752.10, is that correct?

A. Referring to 1946? [81]

Q. Yes.

A. December 13th, \$1,752.10.

(Testimony of Lloyd M. Tucker.)

Q. Yes. Is that right? A. Yes.

Q. Read that amount again. A. \$1,752.10.

Q. Now, would you consult Government's Exhibit 9, being the working account in the Bank of Douglas which he used for his business, and look down there on the same day, December 13. Now, do you find a deposit there of any amount similar to that?

A. On this page, December 13th. Do I find a deposit? Yes, I do.

Q. How much is it? A. \$1,723.82.

Q. Do you find this check also reflected in that account? A. Yes, sir.

Q. On the same day? A. Yes, sir.

Q. How much is it? A. \$1,752.10.

Q. So from that it is reasonable to presume he put cash in to cover this and drew a check for it, isn't it?

A. Yes, that is evidently what he did because prior to that deposit he only had a balance of \$535.00. [82]

Q. That is right. So actually you don't know how much cash he had on hand at the beginning of any one of these years, do you, Mr. Tucker?

A. All I know, Mr. Herring—

Q. Just answer the question, please.

A. Did you ask me if I knew of my own knowledge?

Q. That is right.

A. Why, of course I don't know.

Q. Did you ever find any entries in Mr. Cal-

(Testimony of Lloyd M. Tucker.)

deron's records or his books, particularly his books, did you ever find any entries made by Mr. Calderon himself?

A. Yes, for some of those earlier years I believe some of them were kept by him. I am not——

Q. Not positive about that?

A. I recall looking at records that were kept by him but I don't recall they were in the years 1946—no, not for the years 1946 to 1949, I recall the books——

Q. They were all made by Mr. Verdugo?

A. Yes, that is right.

Mr. Herring: I think that is all, your Honor.

Mr. Petersor: That is all. I would like permission to return Mr. Tucker to the stand at a later matter in this trial.

The Court: To recall him later?

Mr. Peterson: Yes, sir. [83]

The Court: Very well.

It is now approximately 4:30. At this time we will recess until tomorrow at 10:00 o'clock. Please bear in mind the admonition previously given you.

(Whereupon a recess was taken at 4:30 o'clock p.m. on October 21, 1952, until 10 o'clock a.m. October 22, 1952.)

The Court: Call your next witness.

Mr. Flynn: Mr. Webb.

REX E. WEBB

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Flynn): You were on the stand yesterday? A. I was.

Q. I want to show you Government's Exhibit 7 in evidence, Mr. Webb. You have examined that before, have you not? A. I have.

Q. I will call your attention to the last page, this entry here under date of November 4, 1949, of \$700.00. What does that represent there, what does it reflect, withdrawal or deposit?

A. On this statement it would reflect withdrawal.

Q. I will ask you if you ever examined the defendant's passbook covering this same account that is reflected on [84] Government's Exhibit 7.

A. I did.

Q. Where did you get that passbook?

A. From the defendant.

Q. And did you check the entries in that passbook as against the entries on this exhibit 7?

A. I did.

Q. What did you do with the passbook after you got through with it?

A. I returned it to the taxpayer.

Q. As far as you know it is still in his possession? A. Yes, it is.

Q. I will ask you, in checking this passbook against the entries on Exhibit 7 if you found in

(Testimony of Rex E. Webb.)

that passbook any entry reflecting the \$700 withdrawal on this exhibit.

A. There was no entry showing that withdrawal in the passbook.

Q. As far as entries showing deposits in the account, they were all in the passbook?

A. They were all entered.

Q. Mr. Webb, I will ask you if you have made a compilation of the taxes which Mr. and Mrs. Calderon should have paid under the figures represented by the Net Worth Statement prepared and testified to by Mr. Tucker.

A. I did, I made a computation—— [85]

Mr. Herring: Just a moment. I object to that on the ground it is irrelevant, incompetent and immaterial. The figures compiled by Mr. Tucker have been shown by his own testimony to be inaccurate and is not to be the basis for any computation or compilation, therefore it makes no difference if Mr. Webb made a computation of that matter or not.

The Court: The objection will be overruled. Answer the question yes or no. A. Yes.

Q. Based on the figures testified to by Mr. Tucker as to the calendar year 1946, of the income of Mr. and Mrs. Calderon, will you state what the result of your compilation was and what the amount of tax that would be due on income as represented by those figures?

Mr. Herring: Now, your Honor, we make the objection that this is calling for a conclusion from this witness based on something first of all not in

(Testimony of Rex E. Webb.)

evidence, second, based on something which has not been established by the facts to be the basis for any computation, and third as being completely irrelevant in any event. The point being—we have some law we would like to discuss with your Honor on that point—this Net Worth Statement as Mr. Tucker said is worthless if the Cash on Hand is not accurate. Mr. Tucker himself said he didn't know the Cash on Hand and the only entry he made was the cash in the pocket of the individual. He also admitted [86] he was told there was cash in the safe and that he knew it was necessary in the operation of this business that large amounts of cash be kept on hand. Under those circumstances I think it is entirely improper for this witness to be asked to answer any questions such as this.

The Court: I think the witness can make a compilation. I think he should give us the figures which he takes from Mr. Tucker's testimony so we may know.

Mr. Flynn: We will take those from year to year, your Honor, starting out with the year 1946. And there has been no question about the testimony of Mr. Tucker as to those figures.

Mr. Herring: The question was addressed, as I understood it, to the totals, was it not, Mr. Flynn, for each year?

Mr. Flynn: I am asking him to base his compilation upon the Net Worth Statement made by Mr. Tucker's testimony, established by his testimony, from the bank records here and take those

(Testimony of Rex E. Webb.)

figures and make a compilation of them of the amount of taxes that would be due on those figures, that is all.

The Court: Mr. Tucker in his testimony referred to some figures he had in the Statement originally which he corrected.

Mr. Flynn: I think I would take care of that in the examination if they would just give me time, your Honor.

The Court: I think the present question, though, asked for the amount. I think we ought to do it first by setting out the figures which he used as the basis for his [87] computation.

Mr. Flynn: I will have him do that.

The Court: Very well.

Q. (By Mr. Flynn): First, will you state what figures for the year 1946, what figures you based your compilation on.

A. I originally based it on the original figures—

Q. I mean now for the year 1946.

A. For 1946.

Q. Yes.

A. It was based on the net worth gain statement compiled by Mr. Tucker and myself.

Q. Do you have the amount of that?

A. Yes, sir. The amount of tax due, seven thousand—

Q. I mean the figure you based your tax on.

A. \$24,855.49.

Q. What would be the amount of tax from your figure? A. \$7,352.12.

(Testimony of Rex E. Webb.)

Mr. Herring: Just a moment, please. I ask the answer be stricken until I have had a chance to make my objection. Your Honor, the point of my objection is, first of all, that Mr. Tucker's Net Worth Statement, if it were offered as a Net Worth Statement, would not under the rules of this Circuit Court be admissible. Based on that assumption I say that any testimony this man might give as to the result of his computation of tax in relation to Mr. Tucker's figures is also not [88] admissible because Mr. Tucker's own statement was his Net Worth Statement would be no good if the Cash on Hand were inaccurate. That his own testimony developed that the Cash on Hand was inaccurate, therefore this man is testifying from something which is inaccurate, something which could not be admitted in evidence and his answer is not admissible. And we have substantial authority to that effect.

The Court: I think I am familiar with the cases you have in mind. I think the difference in it is your view of Mr. Tucker's testimony. I realize what you are getting at in the objection. The objection will be overruled. However I would ask counsel to have the witness instead of lumping the figure give us the items as Mr. Tucker did in the Net Worth Statement.

Mr. Flynn: The purpose of this, your Honor—I thought we went through all of that with Mr. Tucker and itemized them and testified to his final

(Testimony of Rex E. Webb.)

result. That is all this man's figures are based on, are the final result.

The Court: Mr. Tucker, though, testified he used certain figures in the Net Worth Statement.

Mr. Flynn: That is right.

The Court: That he found out, for instance, that he had a \$700 mistake.

Mr. Flynn: We are on 1946 now, there is no question about any mistake. [89]

Mr. Richey: There is certainly a question about a mistake in 1946.

Mr. Flynn: Well, he is talking about Cash on Hand.

Mr. Richey: No, I am not talking about Cash on Hand. They show there was an error in the Bank of Douglas checking account December 31st, 1945, which was admitted by Mr. Tucker.

Mr. Peterson: How much?

Mr. Richey: I don't know how much it is. That is not my problem. All I say is the gain quoted here of \$24,855.45 is incorrect and this witness has testified himself that was the figure he used to compute the tax on. Mr. Tucker has already stated that figure is incorrect. And I will be glad to go back into the record yesterday—that that figure is incorrect. It is not up to me to determine how far it is incorrect but it is incorrect.

The Court: That was my only purpose in suggesting it be done in the way in which I indicated so it be clear just what figures are Mr. Tucker's this witness is going to use.

(Testimony of Rex E. Webb.)

Mr. Flynn: It was my purpose, your Honor, he is going to use the figure Mr. Tucker testified to, this \$5.00 discrepancy, then we are going to show how much difference that would make in the tax.

The Court: In other words, you are going to do it in reverse?

Mr. Flynn: Yes. [90]

The Court: Well, subject to your doing that you may proceed.

The Witness: The question, please.

Q. (By Mr. Flynn): The question is based on the net worth figures Mr. Tucker testified to which you stated as \$24,855.49. Then the question is, how much tax would there be due on that amount of money by Mr. Calderon and his wife?

A. \$7,352.12.

Q. Now then, Mr. Webb, assuming that in the statement of the bank which was the basis of Mr. Tucker's testimony, statement of the amount in the bank as he based his figures on, there was a \$5.00 error, how much difference would that make in the corrected income and in the tax?

A. Approximately \$1.00, more or less.

Q. Now then, did you also make a compilation of the amount of tax that would be due by Mr. Calderon and his wife for the calendar year 1947, based upon the net worth figures testified to by Mr. Tucker for that year?

A. I did.

Q. What were the figures you based your tax on?

A. \$11,056.82.

Q. And how much tax would there be due by

(Testimony of Rex E. Webb.)

Mr. and Mrs. Calderon on those figures?

A. \$1,450.70.

Q. Now, for the year 1948, Mr. Webb, did you make a similar [91] compilation based on the net worth figures testified to by Mr. Tucker?

A. I did.

Mr. Herring: Mr. Webb, just a moment. May I make the continuing objection, your Honor. I object to the introduction of all this testimony as being based on something not properly in evidence.

The Court: Yes, the record may show a continuing objection to all the testimony of this witness.

Q. Do you have in your figures, Mr. Webb, there was another error of around forty or forty-five dollars? What calendar year would that involve?

A. Would that be on a checking account or savings account?

Q. Checking account.

A. That is a part of Mr. Tucker's file, but I believe it is on the year 1947, possibly 1948.

Q. We have got to know. Now, you have just testified, Mr. Webb, for your figures in the calendar year 1947. Assuming that there was an error of \$48.24, in other words, there would be that much less than the figures that Mr. Tucker testified to, what effect and in what amount would that affect the tax for that year?

A. Approximately \$10.00.

Q. Now, you also figured the tax for the year

(Testimony of Rex E. Webb.)

1948, based on Mr. Tucker's Net Worth Statement and the testimony in this [92] case including the bank records, and what was the amount you based your tax on for that year? A. \$6,874.43.

Q. What tax would be due by Mr. and Mrs. Calderon for that year on those figures?

A. \$230.24.

Q. Now, you made similar calculations for the year 1949, is that correct? A. Correct.

Q. And in figuring the tax due for the year 1949 did you take into consideration this \$700 item you have testified to?

A. I made the proper adjustment.

Q. What was the amount you based your tax on for the year 1949, taking into consideration this \$700 item? A. \$19,506.73.

Q. What would Mr. and Mrs. Calderon's tax be for that year on that amount? A. \$2,645.78.

Q. Now in figuring those taxes did you take into consideration or comparison the dependents and so forth that were claimed by Mr. and Mrs. Calderon in their returns made for those years?

A. Oh, yes, they were given all consideration for all deductions any taxpayer would be entitled to.

Q. Now, you took part in the investigation in this case, [93] didn't you, Mr. Webb?

A. I did.

Q. From practically the start of the investigation? A. I did.

Q. And in that investigation you talked with Mr. Calderon on different occasions? A. Yes, sir.

(Testimony of Rex E. Webb.)

Q. And when you first talked with him, Mr. Webb, what did you advise Mr. Calderon about his rights?

A. I told him that he had the privilege of co-operating or not cooperating, that he had the right to obtain counsel and that whatever he did made no difference with me in this investigation, I would go ahead with it, but he did have rights of counsel and he didn't necessarily have to cooperate with me.

Mr. Herring: Your Honor, in order to keep me from jumping up all the time could Mr. Flynn be admonished to lay the proper foundation for these conversations?

The Court: When you have to make an objection, Mr. Herring, perhaps you had better make it.

Mr. Herring: All right. I make objection to the last statement on the ground the proper foundation was not laid.

The Court: Fix the time and place.

Mr. Flynn: I will.

(Government's Exhibit 11 marked for identification.) [94]

Q. Where was this first conversation had with Mr. Calderon?

A. In our office on the second floor of the Post Office Building at Douglas, Arizona.

Q. Who was present?

A. I believe no one at that time except Mr. Calderon and myself.

Q. That was the time you advised him as you have already testified? A - Yes.

(Testimony of Rex E. Webb.)

Q. I show you now Government's Exhibit 11 for identification and ask you if you have seen it before. A. I have.

Q. Calling your attention to the signatures on this exhibit, do you know who signed that? Were you present when it was signed?

A. I was present.

Q. Who signed it? A. Edward Calderon.

Q. Who else was present when that was signed?

A. Mr. Tucker, Special Agent.

Q. And yourself? A. And myself.

Q. And where did that take place and when?

A. It was on the second floor of the Post Office Building in Douglas and it was, I believe, the 2nd day of August, 1950, [95] is right.

Q. Before the defendant signed this exhibit did he read it in your presence? A. He read it.

Q. Who wrote up this exhibit?

A. Mr. Tucker wrote that on the typewriter.

Q. Who was present when he did that?

A. Mr. Calderon and myself.

Q. Before he wrote it up was all the contents in there, was the matter discussed with Mr. Calderon? A. Had been discussed for hours.

Mr. Flynn: We offer it in evidence.

Mr. Herring: Your Honor, to which we object on the ground the proper foundation has not been laid at this time to the introduction of a statement of this kind.

The Court: Objection overruled. It may be admitted.

(Testimony of Rex E. Webb.)

Mr. Herring: Your Honor, in order to make my record I would like to renew my objection and make it on the ground that the proper foundation has not been laid, that this statement purports to be on its face some sort of an admission of facts, that until the corpus delicti has been proven such admission of facts or such instrument is not admissible; that there is no basis for the Net Worth Statement given, no proper basis, there is no proper basis for the introduction of any evidence at all from Mr. Calderon. That the Government [96] must make its case first, at least the corpus delicti in the case, by independent evidence in such a case as this before such a statement as this could be admitted.

The Court: The further objection will be overruled also.

(Government's Exhibit 11 in evidence.)

Mr. Flynn: At this time I would like to read to the jury this exhibit.

The Court: Has it been marked in evidence?

Mr. Flynn: Yes, as Government's Exhibit 11 in evidence.

I am reading to the jury Government's Exhibit 11 in evidence.

"United States of America,

"District of Arizona—ss.

"Affidavit.

"I, Edward B. Calderon, after being duly sworn upon oath, depose and say:

"I am a citizen of the United States and a resident of Douglas, Arizona. I am engaged in the oper-

(Testimony of Rex E. Webb.)

ation of the Coronado Cafe and Eddie's Automatic Music Company, both located in Douglas, Arizona. I am married and live with my wife and seven dependent children and my mother and father in a house which is owned by my father. Since 1939 I have been engaged with the operation of coin-operated amusement devices in and about Douglas, Arizona.

"During the years 1943 to 1949, inclusive, I have not [97] received any gifts, inheritances, or received the proceeds of any insurance. Since about the year 1941 I have given my wife each month in cash the sum of \$250.00 to operate the household. In October, 1946, my family and myself took a trip to Los Angeles, California, and were gone from Douglas approximately sixteen days. I estimate that I spent \$400.00 in cash on that vacation. In October, 1947, my wife, father, and myself took a trip by train to Mexico City. In addition to the train fare and pullman berths I bought approximately \$200.00 in Travelers Checks which I spent on the trip.

"It has been my practice for the past several years to regularly deposit in my checking account sufficient receipts from my businesses to pay my current bills. Excess receipts I accumulated in my safe for short periods of time and then deposited such moneys in my savings account.

"During the years 1944 to 1949, inclusive, all of the income which I failed to report on the Income Tax returns filed by me for each of those

(Testimony of Rex E. Webb.)

years came from an understatement of receipts from coin-operated amusement devices. None of such unreported income came from the operation of my music store or from the Coronade Cafe. Receipts from those business were reported correctly. The understatement of income from coin-operated amusement devices came about in part by entering the receipt of money from various locations on memorandum paper which later was not transferred to permanent receipts, [98] and therefore did not taken into account in the income reported from coin-operated machines. The understatement of such income also came about from the understatement on my location receipt books of money taken from coin machines. This happened in about thirteen of my locations. I did this because the proprietors of such locations requested me to understate the amount taken from the coin machines in my receipt books so that they would not have to report the full amount of their share. This understatement of income from my coin-operated machines also occurred by a certain number of receipt books being lost or misplaced by myself or my employees. Therefore, the receipts entered in those books were not turned in to my bookkeeper.

"I have carefully read the foregoing statement contained on two pages and it is the truth to the best of my knowledge. This statement has been given freely and voluntarily and I have been advised of my Constitutional rights. I have not been threat-

(Testimony of Rex E. Webb.)

ened or offered any promises or promises of reward in return therefor.

"Signed: Edward B. Calderon.

"Subscribed and sworn to before me this 2nd day of August, 1950, at Douglas, Arizona.

"Lloyd M. Tucker,

"Special Agent.

"Witness: Rex E. Webb, [99]

"Deputy Collector."

Mr. Flynn: That is all.

Cross Examination

Q. (By Mr. Richey): Mr. Webb, will you refer back now to the papers you brought in connection with the compilation of the income tax?

A. Yes, sir.

Q. Tell us what credits or deductions you allowed Mr. Calderon, including the corrections that are made on the Net Worth Statement by Mr. Tucker. What deductions did you allow Mr. Calderon for the year 1946?

A. His personal exemption, that of his wife, and that of five children. Mr. Calderon originally filed his return by taking advantage of the optional standard deduction in lieu of declaring such things as contributions, State Income tax, State sales tax; he took the optional standard deduction allowed by the Government. And in making that computation I allowed him on that same basis, which is a blanket coverage—it is approximately ten percent of the taxable net and it is a blanket coverage covering

(Testimony of Rex E. Webb.)

what we call personal deductions which would ordinarily appear on page three of the return.

Q. And also the \$5.00 discrepancy in the bank account, the checking account in the Bank of Douglas?

A. No, I made no adjustment on that. I did state there would be a dollar, approximately a dollar, difference in the [100] liability as I have stated it, it would be about a dollar less than I had stated.

Q. So the only error in your compilation, then, is that on that \$5.00?

A. Right.

Q. I want to be perfectly fair with you, Mr. Webb, that is the only error?

A. That is the only error I know of, yes, sir.

Q. How long have you been with the Internal Revenue Department, Mr. Webb?

A. Twelve years this month.

Q. I believe you are a Deputy Collector?

A. Yes, sir.

Q. You spent considerable time in computing income tax statements, assisting taxpayers and so forth?

A. It is a part of my job.

Q. Also checking taxpayers' returns?

A. That is part of my job.

Q. For the year 1947 what was the net taxable income figure you used for the year 1947?

A. \$11,056.82.

Q. That is the only compilation you have made, the only compilation from which you have testified was the tax based on that figure?

(Testimony of Rex E. Webb.)

A. That was what I testified to, the tax based on that [101] figure.

Q. The taxpayer received no other credit?

A. He received benefits of optional standard deduction, his personal exemption, that of his wife, his children, and the optional standard deduction which he chose to take in lieu of a few personal deductions which he might have listed.

Q. Did you make any adjustments in relation to the adjustments on the Net Worth Statement?

A. No. I made mention of the fact the difference of approximately forty or forty-five dollars which would have ordinarily appeared in 1948 and increased the tax to what it would have decreased in 1947, to the extent of about ten dollars, approximately.

Q. In 1948 what figure did you use?

A. \$6,874.43.

Q. And in 1949? A. \$19,506.73.

Q. Now that is not the figure that appears on the Net Worth Statement?

A. After making the \$700.00 adjustment it is the figure.

Q. Mr. Webb, I said it is not the figure that appears on the Net Worth Statement. I realize you made the adjustment, but that is not the figure that appears on the Net Worth Statement.

A. That is right, you are right. [102]

Q. What is the figure that appears on the Net Worth Statement? A. \$20,206.73.

Q. Now, you are very familiar, in fact, you

(Testimony of Rex E. Webb.)

helped to make this Net Worth Statement, didn't you? A. I did.

Q. The Net Worth Statement is a thing used for the basis of the compilations to which you have testified this morning?

A. Net worth gain each year.

Q. Yes. You used this Net Worth Statement?

A. The figures I testified to, I used the Net Worth Statement with the exception of 1949, I made the adjustment of \$700.00 which we know was drawn from the bank but the records of the bank didn't show it at the time they were examined.

Q. What was that?

A. I said I made this Statement from the figures as shown in the Net Worth Statement with the exception of the year 1949, I reduced the income—

Q. No, complete what you said before. I think you said that wasn't reflected in the records of the bank.

A. It didn't appear on the bank records when the correction was made.

Q. I thought a little while ago you explained the discrepancy existed because you used Mr. Calderon's passbook?

A. No. I had made a transcription from Mr. Calderon's [103] passbook and Mr. Tucker made one from the bank records and we compared the two records and they coincided and in neither case was there a \$700.00 withdrawal shown.

Q. Mr. Tucker is the one, then, that examined this?

(Testimony of Rex E. Webb.)

A. On the 9th of June or before, before I had contacted Mr. Calderon I had checked his bank records. I made no transcript, I merely pulled totals to check the amounts he had in cash and later Mr. Tucker went down and made a complete check and transcription of that bank record.

Q. Yet you are telling me you know this bank record wasn't complete at the time that record was taken, at the time this record was investigated?

A. My total on these bank accounts as of the end of 1949 were the same which I had taken from the bank records prior to contacting the defendant, were the same as Mr. Tucker had taken on his transcript.

Q. You took what the bank record reflected because the bank record wasn't complete at that time, that is what you are trying to explain to us, isn't it?

A. I took originally the transcription Mr. Tucker made of the bank record. We knew he had bought a piece of property involving \$700.00—

Q. Excuse me, Mr. Webb. All I am talking about is just this—

A. Of course originally I took the bank records as Mr. [104] Tucker transcribed them.

Q. As Mr. Tucker transcribed them. So you don't know, then, whether the bank records were complete at that time or not, do you?

A. His balance as of December 31, 1949, was the same as the balance I pulled off the bank record on the same day at a previous date.

Q. When did he examine the bank records?

(Testimony of Rex E. Webb.)

A. It was after June the 9th.

Q. In 1950? A. 1950, yes, sir.

Q. We are talking about the bank record as it appeared on December 31, 1949, or six months before, aren't we? A. That is right.

Q. And that bank record reflected at the time you looked at it \$18,000 some odd dollars, didn't it?

A. That is correct.

Q. Will you show me anywhere in that account where there is an eighteen thousand dollar balance on it, anytime during the entire history of that record?

A. There is no place a \$18,000 balance appears here.

Q. Where did you get it now? You said you got it off that record?

A. I got it from Mr. Calderon's passbook.

Q. Also you said the bank record reflected the same thing? [105]

A. Prior to interviewing Mr. Calderon the first time I had pulled the beginning and closing amounts on deposit and it reflected \$18,100 and some dollars.

Q. That is the record you examined you are holding right there?

A. I have no way of identifying it. I have no way of saying this is the record I examined.

Q. You heard Mr. Tucker testify to that record, didn't you, and say that last sheet, that second sheet, appeared just the same then as it does now?

A. I didn't hear Mr. Tucker say that.

(Testimony of Rex E. Webb.)

Q. You didn't hear him say that? Did you hear Mr. Hampel say it?

A. I heard Mr. Hampel say that this was a certification of the original as it appears in their records.

Q. We asked him "just as it appears?" And he said "yes," didn't he?

A. Something to that effect, yes.

Q. Will you show us on that record where you got a figure in excess of \$18,000, on that record anytime?

A. In excess of \$17,000?

Q. In excess of \$18,000.

A. There is no figure that appears here in excess of \$18,000.

Q. On the Net Worth Statement the figure that was supposed [106] to have been taken from that record is in excess of \$18,000, isn't it?

A. Yes, there is a difference of \$700.

Q. Going back to this Net Worth Statement, look at the opening year, actually the third year in the Net Worth Statement but for our purposes the opening year, 1945. If any one figure was changed in that entire column it would affect every year thereafter, wouldn't it? This is just a general accounting question.

A. Of course. Give me the question again, please.

Q. If any figure in the column under December 31, 1945, assets or liabilities either one, or the total, were changed in this Net Worth Statement, it would

(Testimony of Rex E. Webb.)

change the total for every year thereafter, wouldn't it?

A. Unless the same item and the same figure on that item was constantly used in each of those succeeding years it would.

Q. They are all used, aren't they?

A. Yes.

Q. It is accumulative, a Net Worth Statement is cumulative, that is right, isn't it?

A. That is true.

Q. The minute we start, no matter where we start, it changes the accumulation each year?

A. As an example, if you take an asset into account at a [107] certain value as of December 31, 1945, and you have used the same value on that asset throughout and then you discover there has been an error on the value placed on that asset, you would use the same new value throughout all these years and it would not affect the net worth gain as was shown by the Statement.

Q. All right. However, in the compilation of these tax returns you told us you made, you said no, these are just the deductions you gave this man, you said you hadn't given him another deduction, you had been doing this for years. You knew on this Net Worth Statement when you changed this figure of \$688.91 that affected the balance continually through this Net Worth Statement?

A. What item is that?

Q. The Bank of Douglas checking account.

A. Five dollar differential?

(Testimony of Rex E. Webb.)

Q. That is right.

A. I qualified my statement at the time I made it that by recomputation that five dollars would reflect about one dollar less tax.

Q. However, that reflects in the ensuing years, it doesn't just go to one year? A. No.

Q. That either increases or decreases the balance in the succeeding years? [108]

A. No, it doesn't change the balance as of the last day of that year because you start out the following year with a correct balance as of the last day of that year. Each year is a period by itself.

Q. Then I believe you stated you gave him no credit, this is talking about the Net Worth Statement, not your standard deductions. Included in the Net Worth Statement there is added in back to his income his State Income tax paid?

A. That is proper.

Q. That is proper? A. That is proper.

Q. How does that show up, then, in determining what is the difference in his net worth each year if he doesn't get any credit for it? You give him tax credit, I understand what you did there.

A. You give him credit. In the upper portion of the Net Worth Statement you list all the taxpayer's assets, you take them into account in the year in which they come to light. You total them and below that we allow him reserve for depreciation which accumulates. You allow him a credit for accounts payable, money he owes to other people, owes on equipment, then you offset the liabilities

(Testimony of Rex E. Webb.)

with assets to arrive at a net figure. Then you may add back in any specific figures you can determine from a matter of record. You add them back in and show he did have, instead of not only [109] increasing his net worth, he didn't spend that money so available to be spent. Had he bought his wife a diamond ring it would have gone in there could we have substantiated it by record and that is a paid out charge he paid out and it had to come from somewhere and belongs in that Net Worth Statement.

Q. How long have you been working in Douglas, has Douglas been included in your area?

A. I get to all the zone offices occasionally.

Q. How long has Douglas been included?

A. Douglas has always been a part of it since we maintained a zone office down there.

Q. In 1935 were you in and out of Douglas?

A. No.

Q. 1940?

A. No, I had never gone down there officially for the Government in 1940.

Q. Were you here in Arizona in 1940?

A. I was.

Q. At the time of this investigation down there in Douglas did you determine whether Mr. Calderon was working other than as reflected on the Net Worth Statement during the years 1941 to 1944?

Mr. Flynn: I object to it as not proper cross examination. Nothing in direct examination of this witness—

(Testimony of Rex E. Webb.)

The Court: He may answer. [110]

A. Possibly it was discussed in general. I wasn't too interested. There is one year in which this investigation involves wherein I think there is a salary of approximately seven hundred dollars and there was a withholding of income tax of ten dollars and something, that was the only salary income I discovered during the years in which this investigation involves.

Q. Did you try to find out whether Eddie was making very much money in 1941, '42, '43 and '44?

A. Well, he told me that machines were hard to get—

Q. Just a minute. Did you try to find out?

A. Yes.

Q. Did you discover he was making pretty good money during those years?

A. According to his accumulation of assets, yes, he had been doing pretty well.

Q. And did he tell you the slot machines he had out at the N.C.O. Club would sometimes bring in a hundred twenty to a hundred and fifty dollars a day, day after day?

A. No, he didn't tell me that.

Q. Did you know he had any coin operated machines spread around the county, you knew that, didn't you?

A. I knew he had at one time.

Q. You knew there were a great many soldiers in and out of Douglas and used Douglas for recreation during the years 1942, [111] '43, '44, and '45?

(Testimony of Rex E. Webb.)

A. Yes.

Q. You knew that this business was quite lucrative under those circumstances, didn't you?

A. If you have enough machines it is.

Q. You knew those soldiers and business condition in general, the soldiers were leaving and business conditions in general began to fall off in 1946, didn't you?

A. I doubt very much—I wouldn't know. I wasn't going into Douglas. I probably hadn't been in Douglas on official business, oh, I hadn't been into Douglas for years. I didn't know what the local situation was. In general business conditions were good in 1946.

Q. Mr. Webb, when you were making a Net Worth Statement it seems to me that would be pretty important to find out those things. Didn't you investigate?

A. A Net Worth Statement is a statement of assets a man owns at a beginning period. You have to pull them from a matter of record on good authoritative sources. We don't care if he made a million dollars in '41 and lost it in '42, the fact is the 1st day of January 1946 the man owns so much in bonds, he has so much money, he has so many pieces of property, he has so many automobiles, and it all costs him so much. That is your beginning point. That is his net worth as of that day; that is the thing we are interested in. [112]

Q. That is right. Now, assuming that Mr. Calderon had considerable more cash than is shown on

(Testimony of Rex E. Webb.)

this Net Worth Statement of December 31st, 1945, that would have a definite effect on this Net Worth Statement, wouldn't it?

Mr. Flynn: We object to it as assuming a fact not in evidence, hypothetical question.

The Court: He may answer.

A. After examining his prior income tax returns prior to 1946 I made no assumption he did have a lot of cash on hand.

Q. You didn't answer my question, Mr. Webb. Assuming he had it on hand, it would have made a considerable difference in this Net Worth Statement?

A. If he had the same amount of cash at the beginning of each succeeding year—

Q. Please, Mr. Webb, just answer one question at a time. Assuming Mr. Calderon had considerable more cash on hand December 31st, 1945, than the amount shown on the Statement, it would have had a definite effect on whether he earned as much money as this Statement showed in the succeeding years?

A. It would have an effect, yes, sir.

Q. Now, when you completed this Net Worth Statement and you saw earnings for 1944, eight thousand; 1945, eight thousand; 1947, eleven thousand; 1948, eight thousand; then in 1949 and 1946 the amazing figures of twenty-four thousand dollars and twenty thousand dollars, entirely out of line with the other [113] years, wouldn't that raise some

(Testimony of Rex E. Webb.)

question in your mind to say to yourself why did that happen?

A. In making the net worth balance——

Q. Excuse me, Mr. Webb, you are not answering my question. Wouldn't that raise some question in your mind as to how that occurred? A. Yes.

Q. Now, did you investigate to find out why that occurred, whether maybe there was more cash on hand, what business conditions were during 1946 in Douglas, where the cash came from that was deposited in the bank in the year 1949? Did you investigate any of that?

A. We investigated everything, 1946 to and including 1949, all his assets, and we used them when they came to light, when they popped up, which is proper.

Q. That is right, when they popped up, that is what you said.

A. When they come to light that is when you accept them as income.

Q. You recall this statement, Mr. Flynn, counsel for the Government—— A. Exhibit 11?

Q. Yes. I believe you stated on direct examination that before Eddie signed this you spent hours discussing this matter. Also on the same date you had Eddie sign this Net [114] Worth Statement, didn't you?

A. He signed the Net Worth Statement on the same date.

Q. Didn't you ask him to sign it? A. No.

Q. He just came in and said, "I want to sign

(Testimony of Rex E. Webb.)

the Net Worth Statement," is that it?

A. No. We went over the Net Statement item by item and substantiating with records——

Q. Please, Mr. Webb, just answer the question. Didn't you ask him to sign this Statement?

A. No, we told him if it was correct he had a right to sign it or he did not have to sign it and he was advised of his Constitutional rights by Mr. Tucker.

Q. So you advised him of his Constitutional rights and asked him to sign the Statement, didn't you?

A. I didn't ask him to sign the Statement.

Q. Anyway, you spent hours going over this Statement, didn't you, this Statement right here?

A. Yes.

Q. You had a lot of data you showed to Eddie so you could explain to him where all these figures came from, didn't you? A. We did.

Q. As a matter of fact, it was quite extensive, this discussion with Eddie?

A. We had been together since approximately 8:30 in the [115] morning of August 2nd, 1950; that Statement was signed late in the afternoon. We had been going over records and going over the entire phase of the case.

Q. And you gave Eddie the benefit of all these facts you had discovered, hadn't you, you explained them to him so that he would know this Statement was correct?

A. Every item was explained to him.

(Testimony of Rex E. Webb.)

Q. Yes. After all that was done, all completed, then Eddie signed this Statement, didn't he? You didn't ask him to sign this first, again went over this?

A. I wouldn't say whether it was before or after. There were some things brought to light. Eddie told us some things near the last minute when he made that statement that he hadn't told us before.

Q. But you had been over all this before this Statement was made, isn't that right? ▶

A. I think—yes, I think that is right.

Q. I don't mean this as being impertinent, Mr. Webb, is there anyone in this Court Room or jury or any one of us that could have sat there with you and listened to the explanation of this Net Worth Statement, the complete discussion of Eddie Calderon's affairs, and at that point not know that he hadn't included all of his—

Mr. Flynn: Just a minute. Have you finished your speech? [116]

Q. No, not yet. That he hadn't included all his taxable income or his receipts?

Mr. Flynn: We object on the ground it is improper, argumentative.

The Court: The question is argumentative.

Q. All right. As far as Mr. Calderon was concerned, after everything you had been over with him at the time you asked him to sign this Statement he certainly knew he hadn't included all his income, didn't he? You had been explaining that.

(Testimony of Rex E. Webb.)

A. He knew it before that.

Q. Oh, he knew it before that? Now, you tell me when he knew it before that.

A. The first time I ever saw Mr. Calderon that I recollect was when he walked into our office on the 9th day of June 1950, he didn't introduce himself, he comes in and he laid down one of these split books and he said, "I guess I have lost some of these or failed to give them to my bookkeeper." The first thing he said to me, he came in excited and he said, "I guess I have lost some of these or forgot to give them to my bookkeeper."

Q. Did he tell you then, "I know I filed some income tax returns and didn't put all my money in it?"

A. No, he didn't say that.

Q. All right, when did he say that? When he signed this [117] Statement was the first time he ever said that to you, isn't it?

A. He as much as said that when he admitted he hadn't turned all the income over to his bookkeeper.

Q. Did he ever say it to you? Don't tell me what you construe what he means by things. Did he ever tell you, "I didn't know I turned in all my income," until he signed this Statement?

A. No.

The Court: At this time we will take the regular morning recess. Please bear in mind, ladies and gentlemen, the admonition heretofore given you.

(Recess.)

Mr. Richey: No further questions.

Mr. Flynn: That is all.

EUGENE C. VERDUGO

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Flynn): Please state your name.

A. Eugene C. Verdugo.

Q. Where do you live?

A. 1119 H Street, Douglas, Arizona.

Q. What is your business or occupation? [118]

A. I am manager of the Jennings Lumber Company.

Q. You are acquainted with the defendant here, Edward Calderon?

A. I am, yes.

Q. Did you ever do any work for him?

A. I did.

Q. What was the nature of the work?

A. The nature of my work was bookkeeping, putting into records and books.

Q. When did you start that work?

A. I would say about in the early 1940's, I can't recall the exact year.

Q. Just describe what you did. I don't mean the particulars of it, but generally what you did in connection with keeping his records and books.

A. I put into books or records material which he furnished me in the way of receipts, disbursements and so forth.

Q. Were you a fulltime employee there?

A. No, I certainly wasn't.

Q. What was the source of your information for

(Testimony of Eugene C. Verdugo.)

the records you made and the entries you made in keeping his books?

A. Do you refer to any particular year or the beginning?

Q. No, generally what was your source? All during the time you were working for him what was the source of your information? [119]

A. At first the source of my information was a list of locations for every month and the amounts taken in from each particular location.

Q. Where did you get that information?

A. Mr. Calderon furnished it to me.

Q. In what form did he furnish it to you, orally or written form?

A. Written form on paper.

Q. What other information did you have as the basis for the entries into the books besides that?

A. I had a roll of invoices for each particular month and a list of the checks.

Q. Who furnished you those?

A. Mr. Calderon.

Q. Did you have any information yourself, any direct original information as to the source of his income or expenditures except as furnished by him to you? A. None.

Q. Did you make out any of his income tax returns? A. Yes, I did.

Q. What year?

A. Well, if I recall correctly, possibly the year 1943 must have been around the first one.

Q. Did you make out any after that?

(Testimony of Eugene C. Verdugo.)

A. Oh, yes, clear on up to and including 1950, I believe was [120] the last one, I am not quite sure.

Q. In making out those income tax returns where did you get the information for the figures that you put in those income tax returns?

A. The information I took from the books and records that were being used for his business.

Q. Books and records you kept?

A. That is right.

Q. Did you have any independent knowledge outside of what those books and records reflected of his income or his expenditures?

A. No, I didn't.

Q. So these income tax returns you made about him were based solely on the records that were kept by you?

A. That is right.

Q. And those records were based on information and data furnished to you by Mr. Calderon?

A. That is right.

Q. Did you ever have any conversation with Mr. Calderon about his income or his income tax returns?

A. Yes, I did.

Q. Can you place any particular conversation you had in which they were discussed?

A. It was either—I think it was the year 1948, that is it was in the year 1949 that we were discussing his 1948 tax [121] returns.

Q. Where did that conversation take place?

A. At his place of business.

Q. Who was present?

(Testimony of Eugene C. Verdugo.)

A. Mr. Calderon and myself.

Q. What generally was the discussion, without saying what was said, what were you discussing?

A. I was discussing his business, well, I would say, sir, his net profit and loss, I would say.

Q. Were you discussing any particular year's income or returns?

A. Yes, I think we were discussing the 1948 return.

Q. Can you tell the Court and jury substantially what was said in that conversation relative to any particular year's income, by Mr. Calderon or you?

A. I do remember telling him—I went through the profit and loss statement with him and I showed him where his music company, that is, the vending machine company, was losing money after depreciation. I told him he would be better off to close that business and get out of it, go to work at something else because he had long hours, killing himself, and it wasn't worthwhile because the statement that year showed a net loss after depreciation.

Q. Did you ever have any conversation with him relative to the collections from the different locations on these music [122] boxes?

A. You mean at any time?

Q. Yes, at any time during the years 1946 to 1949.

A. Yes, there was one particular year that I started numbering the books because in our conversation it developed that books were probably being misplaced or lost by he or his employees, that

(Testimony of Eugene C. Verdugo.)

went out on locations. And for my own information I numbered the books so that I knew I would be working with him in sequence and not have a book or two lost or out of the place of business at the time.

Q. Did he ever discuss with you at that time or at any other time the question of receipts from the operators where these machines were located?

A. Not up to and including 1949, no.

Q. After this investigation started, you recall when it first started? A. Yes.

Q. After it started did you have a conversation with Mr. Calderon about the receipts from these music boxes? A. Yes, I did.

Q. Where did that take place?

A. It took place in Mr. Calderon's automobile right outside my residence.

Q. And when?

A. It was in the evening. [123]

Q. What year or month, if you can fix it?

A. It was in 1950. I can't place the month but it was after the investigation started.

Q. Was anyone else present?

A. No, just us two.

Q. What was said at that time by Mr. Calderon in his conversation with you?

A. I asked Mr. Calderon why there was so much difference in the income we showed on the books and what was claimed that he had made and he at the time stated and told me that on some locations he hadn't put down the correct amount taken in

(Testimony of Eugene C. Verdugo.)

because the owners or proprietors of these locations had stated and stipulated to him they didn't want the right amount down. He thought about it in his own mind, thought of it very intensely. They told him if he didn't do it someone else would, so he did do that, according to what he told me. And I mentioned then to him it would have been very good, would have been all right as far as he was concerned if he would have reported his entire amounts himself and let them do what they wished.

Q. What did he say to that, if anything?

A. He didn't have much to say to that.

Q. That conversation you say took place in 1950 after this investigation started?

A. In 1950. [124]

Q. And did you ever discuss that with him before, during the time you were keeping his books?

A. Not that particular discussion, no.

Q. Did he make any other explanation at that time of the discrepancy in his reported income and what was claimed he made?

A. Yes, he went very extensively into lost receipt books, misplaced. I estimated with him and told him if he lost one receipt book which contained fifty sheets it could make a difference of one thousand to fifteen hundred dollars or possibly more receipts if that particular book had been lost and had not been reported to me.

Mr. Flynn: That is all.

(Testimony of Eugene C. Verdugo.)

Cross Examination

Q. (By Mr. Herring): Mr. Verdugo, your main business is the operation of a lumber company?

A. That is right.

Q. How long have you worked for this lumber company?

A. I have been working with him for fifteen years, going on fifteen years I would say.

Q. You have worked up from just an employee until you are local manager in Douglas of Jennings Lumber Company?

A. I started with them as a bookkeeper, up to local manager.

Q. In the early years, say, 1941 to 1942 you did some [125] outside extra work for your friends or people to augment your income, didn't you?

A. That is correct.

Q. In 1942 about Mr. Calderon came to you and asked you to keep his books for him?

A. Yes, he came to me.

Q. Before that his books had been kept by Mr. Speer, hadn't they?

A. That is correct.

Q. Mr. Speer was an elderly gentleman in Douglas who had run a restaurant and candy store?

A. I would say a confectionary store, yes.

Q. Who was a very good friend of Eddie and Eddie's family? A. That is right.

Q. As a matter of fact, Eddie's brother worked for Mr. Speer, didn't he? A. Yes.

Q. Mr. Speer had gotten elderly so Eddie asked

(Testimony of Eugene C. Verdugo.)

you to take on the job of doing his books instead of letting Mr. Speer do it, is that correct?

A. Eddie came to him, not exactly right away but I would say three or four months after Mr. Speer was unable to continue with the records and asked if I wouldn't give him a hand so he could make his income tax report.

Q. Mr. Speer had kept his records up to that time in a [126] rather complete but a rather primitive fashion, had he not?

A. I would say yes.

Q. At that time did Eddie know anything at all about bookkeeping or business affairs?

A. Well, in my estimation he hasn't known very much about bookkeeping at all, even today.

Q. He didn't know anything about it then and he doesn't know anything about it now. At the time he came to you you more or less took this on as a personal favor for Eddie, didn't you?

A. That is right.

Q. Did you believe this would be very much of a job?

A. No, I didn't.

Q. At first it wasn't, was it?

A. No, it wasn't.

Q. Eddie was working at the smelter at the time too, wasn't he?

A. I know he worked there at the smelter one year. I don't recall when.

Q. Eddie's practice was to bring you at the end of every month all his receipt books, receipts and invoices and you would enter them up for him?

(Testimony of Eugene C. Verdugo.)

A. Not the first years. I would get a year's all at once.

Q. At the end of the year?

A. That is right.

Q. And he would have invoices with rubber bands around them [127] for each month?

A. That is right.

Q. And his receipt books were scraps of paper, whatever he had to show the receipts?

A. That is right.

Q. You made the entries and from that made the income tax returns? A. That is right.

Q. When did you start spending more time with Eddie's books?

A. I would say around the year, either '46 or '47, when he opened up a music store on G Avenue and he had office space then.

Q. Up until that time he had been operating his business out of the back of Mr. Speer's store, hadn't he? A. That is right.

Q. That was on, oh, just past 11th Street on G Avenue? A. Yes.

Q. During that same period from 1942 to 1946 your duties in your own business had increased tremendously, hadn't they? A. Very much so.

Q. And Eddie's business was increasing? In fact, during the war it was a big business, a big job? A. That is right.

Q. When did you first determine or begin to feel it was too big a job for you to try to handle in connection with your [128] other business?

(Testimony of Eugene C. Verdugo.)

A. I don't recall the year but I did mention to Eddie his business was getting such he needed someone to work there all day long to handle everything as it should be handled.

Q. That was along in '45 or '46, during the war, wasn't it? A. It was around——

Q. 1944? A. No.

Mr. Flynn: Just let the witness answer.

A. About 1947, I would say.

Q. Eddie tried to find somebody else, didn't he?

A. I don't really know whether he did or not.

Q. At any rate you continued with it until 1950?

A. That is right.

Q. During this time—by the way, you have known Eddie Calderon practically all your life?

A. I have known Eddie for many, many years.

Q. You know his educational background and all about him? A. Yes.

Q. I think he went for two or three months to high school was all?

A. I know he had to quit school to work.

Q. He got into this coin operating business and this music business while he was a fry cook at a little off-the-arm restaurant? [129] A. Yes.

Q. You know he has worked very hard all his life and has been very thrifty?

Mr. Flynn: We object to that as improper cross examination of this witness, your Honor. Defensive matter. If they want to put the man on and testify to his life's history it is all right, but not proper cross examination.

(Testimony of Eugene C. Verdugo.)

The Court: He can answer the question, but don't get too far afield.

Mr. Herring: Would you read the question, Mr. Reporter?

(Last question read.)

A. Yes, I do know he has worked hard.

Q. Mr. Verdugo, from the way Eddie kept his records from the time you started to work to help him out, from 1942 clear through 1947 or 1948, his records were very fragmentary, weren't they?

A. Always, yes.

Q. You never were sure at the end of the year in your own mind quite whether you got everything or not because of that, isn't that right?

A. After viewing his profit and loss statement I didn't feel in my own mind everything was run through there.

Q. Do you recall you talked about this conversation you had with Eddie after this investigation started, you told him there was this discrepancy that appeared from this statement [130] the Internal Revenue man had shown you and he told you about the lost receipt books? A. Yes.

Q. And you explained to him that might make a difference of one thousand, fifteen hundred, maybe two thousand dollars for each book?

A. Approximately for each book. It would vary.

Q. Which would make a tremendous difference if he lost two or three in any one year?

A. That is right.

Q. At one of these conversations also you sug-

(Testimony of Eugene C. Verdugo.)

gested to him he was losing money in his coin operated machine business, his music boxes and pinballs and so forth, didn't you? A. Yes.

Q. Didn't at that time Eddie tell you, "Well, Gene, it looks to me like I make money, I pay out everything and then I have something left," isn't that about what he said? He didn't seem to understand what you were talking about?

A. No, I don't think he mentioned that at that particular time. I don't recall that conversation.

Q. What did he say?

A. At that time all Eddie told me I can remember was, just kind of looked blank to himself and smiled and that was all, blank.

Q. Apparently it didn't make much sense to him, is that the [131] idea?

A. He perhaps never comprehended what it meant, maybe.

Q. When this investigation started you were in on several conversations with Mr. Webb and Mr. Tucker? A. Yes.

Q. During the course of these conversations did you tell them, or you told them, didn't you, that Eddie kept from the very nature of his business quite large amounts of cash in his safe?

A. I remember telling one of them, I don't remember which one, Mr. Tucker or Mr. Webb, that he did carry cash, plenty of cash in his safe because of the nature of his business, he had to be making change, cashing checks and so forth for his locations.

(Testimony of Eugene C. Verdugo.)

Q. Eddie told them too, didn't he?

A. Not in my presence. He might have told them when he was with them alone.

Q. Did he keep large amounts in his safe, Mr. Verdugo?

A. I know that he kept money but I never knew the amount because I never had any chance to check it or even count it.

Q. Did you happen to notice in the safe, notice the money?

A. I had noticed him making change from the safe but never noticed the amounts.

Q. Now, did Mr. Webb or Mr. Tucker when this discussion took place about the large amounts of cash he had to keep in his [132] safe for business purposes, did they ever ask you how much he kept in his safe? A. No.

Q. Did they ask him in front of you how much he kept in his safe? A. Not in front of me.

Q. Mr. Calderon was there when one of these conversations took place, wasn't he? A. Yes.

Q. Did they show any further interest in any amount of cash he might have had in his safe at any time? A. Not in my presence.

Q. During this investigation when Mr. Webb and Mr. Tucker were investigating this whole matter did Mr. Calderon cooperate with them to the utmost?

Mr. Flynn: We object to that as calling for a conclusion of the witness. State what was said and done, let the jury determine whether he cooperated.

(Testimony of Eugene C. Verdugo.)

Mr. Herring: This is cross examination.

The Court: Oh, he may answer.

A. Yes, he did.

Q. You also cooperated with them as Mr. Calderon's accountant to your utmost?

A. I certainly did, yes.

Q. What were Eddie's orders to you as his book-keeper concerning your cooperation with them?

Mr. Flynn: We object to that as a self-serving declaration after the investigation started.

The Court: No, he may answer.

A. He told me we should give them everything they asked for.

Q. Mr. Verdugo, this Statement, these figures that Mr. Tucker and Mr. Webb produced after their investigation, they showed them to you, this Net Worth Statement or whatever it was?

A. Yes, I saw them.

Q. At this time did you investigate independently any of the figures that were on there?

A. I certainly didn't.

Q. You relied on what they told you about their accuracy?

A. You mean the figures that were on the Net Worth?

Q. That is right. The only thing you approved of, looked all right to you, was the procedure that they had gone through?

A. That is the only thing I approved.

Q. None of the figures, you knew nothing about any of them?

(Testimony of Eugene C. Verdugo.)

A. None of the figures, I didn't know a thing about any of them.

Q. During your acquaintance with Mr. Calderon, your business and personal acquaintance, you know, do you not, he has relied on others for his book-keeping and for legal work and insurance and everything else? In other words, he relies completely on other people for that, on technical matters? [134] A. Yes.

Q. How many times in the course of this investigation did you tell Mr. Tucker or Mr. Webb or both of them that you were sure in your own mind and from your knowledge of Eddie that he never intended to defraud anybody?

Mr. Flynn: We object to that as immaterial and not proper cross examination.

The Court: He may answer.

A. I think I told both of them possibly at least twice.

Q. Did Eddie ever make any entries on his books himself as far as you know?

A. Not that I know of.

Mr. Herring: That is all.

Mr. Flynn: That is all. The Government rests.

Mr. Herring: I would like to make a motion at this time, your Honor.

At this time, your Honor, I would like to move on behalf of the defendant the case be dismissed on the basis the Government has completely failed to prove a case. There is no corpus delicti, no case proven of any sort.

If you would like to discuss it further in the absence of the jury or in front of them, it makes no difference to me.

The Court: No, I have followed the matter, Mr. Herring, and your motion will be denied at this time.

Mr. Herring: Your Honor has probably read the authorities [135] I have in mind. I am not sure you have, of course.

The Court: I have read a great many of the cases where the prosecution was based on net worth, is that what you mean?

Mr. Herring: Yes.

The Court: I think from the motion you made heretofore I am quite sure I appreciate your point and, as I say, I have read a great many authorities on that proposition. The necessity for a sound basis, and so on, I imagine that is one of your points.

Mr. Herring: Yes.

The Court: On the matter of corpus delicti, the Spriggs case is one case.

Mr. Herring: That is one, then there are several cases in 175, 176 and 179 Federal 2nd. I don't believe the Government has proven a corpus delicti at all or proven a case at all sufficient on the basis of those cases.

The Court: Well, the motion will be denied at this time.

Mr. Herring: Your Honor, we have some witnesses here from Douglas who are character witnesses. Ordinarily, of course, they would be put on last; to convenience them I wonder if I could in-

dulge your Honor and counsel to put them on at the present time, start putting them on now, between now and noon.

The Court: Yes, you may do that.

FRANK SHARP, JR.

called as a witness herein, having been first duly sworn, [136] testified as follows:

Direct Examination

Q. (By Mr. Herring): State your name.

A. Frank Sharp, Jr.

Q. You live in Douglas, Mr. Sharp?

A. Yes, I do.

Q. You have lived in Douglas how long?

A. Since 1917.

Q. How long did you work for the Bank of Douglas?

A. I went to work for the Bank of Douglas in 1917.

Q. How long did you work there?

A. Until 1947, thirty years.

Q. During that period you were also a member of the State Legislature?

A. Yes, six terms.

Q. You are now in what business?

A. I am in the real estate and insurance business at the present time.

Q. On your own?

A. On my own, yes.

Q. During the time you have lived in Douglas have you become acquainted with Mr. Eddie Calderon?

(Testimony of Frank Sharp, Jr.)

A. Yes, I have known Mr. Calderon a great many years.

Q. From that knowledge and association with Mr. Calderon has [137] any of it been in a business way? A. Yes.

Q. From that association state whether or not you know if Mr. Calderon relies on other people for matters such as insurance and his insurance coverage entirely?

Mr. Flynn: Objected to as no defense, nothing to do with a character witness.

The Court: I don't see the materiality of it, Mr. Herring.

Mr. Herring: Of course, your Honor, it is quite obvious in this case the defendant has relied—

Mr. Flynn: Counsel is testifying now. We would like a ruling on it. If counsel can testify we might as well let this man testify.

The Court: I don't see the materiality of it. He is entitled to show me where he thinks it might be material if he can.

Mr. Herring: It is material in this respect. It is our position Mr. Calderon has relied on other people due to his background and lack of education to take care of all matters of insurance, matters of accounting.

The Court: There is where I don't see where it is material. This question is relating to insurance.

Mr. Herring: Yes.

The Court: I don't see the materiality of it, Mr. Herring.

(Testimony of Frank Sharp, Jr.)

Q. (By Mr. Herring): All right, Mr. Sharp, do you know other people in the community that know Mr. Calderon? A. Oh, yes, a great many.

Q. Do you know Mr. Calderon's reputation in the community in which he lives for being a truthful and law-abiding citizen?

A. His reputation has always been very good.

Mr. Herring: That is all.

Mr. Flynn: No questions.

CURTIS PAGE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Herring): What is your name, sir?

A. Curtis Page.

Q. You live in Douglas, Arizona?

A. Yes, sir.

Q. How long have you lived in Douglas?

A. Since 1937.

Q. What is your business there at the present time?

A. Half owner of Brown-Page Mortuary.

Q. Do you know Mr. Eddie Calderon, the defendant here? A. Yes, sir.

Q. How long have you known him?

A. Since 1937.

Q. You know other people that know him in the community in [139] which you live?

A. Yes, sir.

(Testimony of Curtis Page.)

Q. Do you know his reputation for being a truthful and law-abiding citizen in that community?

A. Yes, sir.

Q. Is it good or bad? A. Good.

Q. Do you know his reputation for being an industrious and thrifty citizen? A. I do.

Q. What is that? A. Very good.

Mr. Herring: That is all.

Mr. Flynn: No questions.

GEORGE FLEETHAM

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Herring): What is your name?

A. George Fleetham.

Q. What is your business, Mr. Fleetham?

A. I am in the garage business, servicing and storage.

Q. You live in Douglas? A. Yes. [140]

Q. How long have you lived there?

A. Since 1925.

Q. Do you know Eddie Calderon?

A. Yes, I have known him a long time.

Q. Do you know other people in the community that know Eddie? A. Yes.

Q. Do you know Mr. Calderon's reputation in the community in which he lives for being a truthful and law-abiding citizen?

A. It has always been good.

(Testimony of George Fleetham.)

Q. Do you know his reputation for being an industrious and thrifty citizen?

A. Yes, he has been a very hard worker.

Mr. Herring: That is all.

Mr. Flynn: That is all.

HENRY BEUMLER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Herring): What is your name?

A. Henry Beumler.

Q. Where do you live, Henry?

A. In Douglas, Arizona.

Q. What is your business or profession?

A. I am an attorney. [141]

Q. How long have you lived in Douglas?

A. Since 1913.

Q. You were born there, weren't you?

A. That is right.

Q. What position do you now hold in the municipal government of the City of Douglas?

A. I am the Mayor.

Q. You are also United States Commissioner in Douglas? A. Yes.

Q. Do you know Edward Calderon sitting here?

A. I do.

Q. How long have you known Eddie?

A. I don't know, I knew him before I went in the Army, that was 1940, I think, about fifteen

(Testimony of Henry Beumler.)

years, something like that.

Q. Do you know others that know him in the community? A. Yes, I do.

Q. Do you know his reputation in the community in which you live for being a truthful and law-abiding citizen?

A. It has always been good.

Q. Do you know his reputation for being a thrifty and industrious citizen?

A. That is good too.

Q. Has that been good? A. Yes.

Mr. Herring: That is all. [142]

Cross Examination

Q. (By Mr. Flynn): What are your duties as United States Commissioner?

A. Somewhat the same as a Justice of the Peace does in the State set-up, when people are brought before me as United States Commissioner I ascertain if there is sufficient evidence to hold them for the United States District Court.

Q. Have you had many hearings down there?

A. During the last week we had fifteen wet Mexicans.

Q. In other words, people who are charged with crime are brought before you for preliminary hearings? A. If they are Federal cases, yes.

Q. How long have you been Commissioner?

A. Four years and three months, I think.

Q. Did you ever have anybody brought before you charged with a crime that prior to that time

(Testimony of Henry Beumler.)

had a good reputation? A. No, I didn't.

Q. Never?

A. Will you ask that question again?

Q. Did you ever have anybody brought before you charged with a crime whom you knew and prior to that time bore a good reputation?

A. Oh, yes.

Mr. Flynn: That is all. [143]

PERCY BOWDEN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Herring): What is your name?

A. Percy Bowden.

Q. You live in Douglas, Arizona?

A. Yes, sir.

Q. How long have you lived there, Mr. Bowden?

A. Since 1914.

Q. What position do you now occupy in Douglas?
A. Chief of Police.

Q. How long have you been Chief of Police?

A. Thirty-one years.

Q. Do you know Eddie Calderon?

A. Yes, sir.

Q. How long have you known Eddie?

A. I have known him since he was a small boy.

Q. Do you know his reputation in the community in which he lives for being a truthful and law-abiding citizen?
A. Yes, sir.

(Testimony of Percy Bowden.)

Q. Is it good or bad? A. Good.

Q. Do you know his reputation in that community for being [144] thrifty and industrious?

A. Yes, sir.

Q. What is it? A. Good.

Mr. Herring: No further questions.

Mr. Flynn: That is all.

Mr. Herring: Your Honor, could we take our noon recess now and begin with whom I believe will be our last witness immediately after the noon recess?

The Court: Very well. We will recess today until 1:30.

(Whereupon a recess was taken at 12:00 o'clock noon until 1:30 o'clock p.m.)

LOUIS ACOSTA

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Richey): Please state your name.

A. Louis Acosta.

Q. Where do you live, Mr. Acosta?

A. Douglas, Arizona.

Q. How long have you lived in Douglas?

A. Since 1922.

Q. What is your present business or occupation?

A. I am in real estate and insurance, doing accounting, [145] income tax work.

Q. You also do tax work and accounting, you

(Testimony of Louis Acosta.)

say? A. Yes.

Q. Prior to 1946 by whom were you employed?

A. The Internal Revenue Department.

Q. Deputy Collector?

A. Deputy Collector, yes, sir.

Q. Do you know Mr. Calderon here at my left?

A. Yes, sir.

Q. How long have you known Mr. Calderon?

A. About twenty years, I would say.

Q. Do you know other people in the city of Douglas in the community in which you and Mr. Calderon live who also know Mr. Calderon?

A. Yes, I do.

Q. Do you know his reputation among the people in Douglas for truth and veracity?

A. I do.

Q. What is his reputation for truth and veracity? A. It is very good.

Q. Do you know his reputation in the same community for being an industrious and thrifty person and citizen? A. I do.

Q. What is that reputation?

A. It is very good. [146]

Q. During the period of time you have known Mr. Calderon when it is necessary for him to have any bookkeeping or tax work or any technical work done have you ever known of him to do it himself?

Mr. Flynn: Objected to as immaterial, not material to the issues in this case.

(Question read.)

The Court: He may answer.

(Testimony of Louis Acosta.)

A. He always comes and asks about it.

Q. He relies on other people for it then?

A. Usually he does.

Mr. Richey: That is all.

Cross Examination

Q. (By Mr. Flynn): Did you do any tax work for him in connection with his income tax returns for 1947 to 1949?

A. No, sir.

Mr. Flynn: That is all.

Mr. Richey: That is all.

EDWARD B. CALDERON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Herring): Mr. Calderon, you speak as loudly as you can. You are [147] the defendant in this action? A. Yes.

Q. You live in Douglas?

A. Yes, Mr. Herring.

Q. How long have you lived in Douglas?

A. Since 1916.

Q. Where did you go to school, Mr. Calderon?

A. In the Douglas public schools.

Q. How many were there in your family?

A. Three sisters and two brothers.

Q. Your father and mother are still living?

A. Yes, they are still living.

(Testimony of Edward B. Calderon.)

Q. What grade did you get through in the public schools of Douglas?

A. I went up to about two months in high school.

Q. Up to high school?

A. Up to two months.

Q. What year was that? A. In 1926.

Q. In about 1933 and '34 where were you working in Douglas?

A. I was a fry cook at the Coney Island Cafe.

Q. How much were you receiving a week as fry cook?

A. I was working twelve hours a week——

Q. How much did he pay you?

A. Eight dollars a week, a dollar a day. [148]

Q. And meals? A. Yes, meals too.

Q. At that time were you married?

A. I married in 1933.

Q. Where were you living at that time?

A. 319 Seventh Street.

Q. Is that the home of your father and mother?

A. Yes.

Q. You have lived there always?

A. I have always lived there, yes.

Q. Does your father work at the present time?

A. No, he doesn't.

Q. How long has it been since he has been able to work?

Mr. Flynn: Objected to as immaterial.

The Court: Objection sustained.

Q. Mr. Calderon, in 1933 and 1934 when you

(Testimony of Edward B. Calderon.)

were working as a fry cook at the Coney Island did you become involved or get into the coin operated machine business?

A. In 1935 I believe i did, yes.

Q. How did it happen?

A. I was working in the Coney Island when one, they call them operators of amusement machines, came in with two small counter penny vending machines or counter slot machines, they call them. He told me if I would lend him or he wanted to hock me those two machines for seven dollars and he would give [149] me ten dollars in about a week, he would come down and pick them up. I didn't have the money but I asked the proprietor to let him have the seven dollars. So I let him have the seven dollars and he gave me the two machines. I set them back in the restaurant there and I waited for about a week or two to see if he would come back for his machines. He didn't come back in about two or three weeks so I knew I needed the money, my seven dollars, so I thought I had better see if I could get those machines working. So I went to see those machines, they were locked. I didn't have any keys to open so I pried the doors open and monkeyed with it. I got to finding out a lot of that stuff was broken inside, so I fixed the springs, tried them and I finally got one of them working. So I asked the proprietor if I could set that penny machine on the counter to see if I could make my money out of it. He said, "Yes, you can go ahead and set

(Testimony of Edward B. Calderon.)

it up." I put that machine up there. In about a week we checked it and it had about eight dollars worth of pennies. So I thought that was pretty good, I was making eight dollars a week on my wages and four dollars from that machine. I thought I had better fix the other one and I went ahead and monkeyed with it, it was broken too. I got to monkeying with it and I finally got it straightened out. So I went and placed that machine right by the other one and I asked the proprietor again about having this machine and he said go ahead. I put it there too, but [150] this machine didn't turn out to be so good because every time they played it, almost every time, it paid off. So at the end of eight days we checked it but that machine hadn't done any good so the proprietor said if it don't do any good you might as well take it down. So I did. In the meantime, I don't know, maybe three or four weeks later, one of those fellows that was peddling machines, he came in with a nickel machine, counter nickel slot machine. He told me if I would want to buy that, I told him, "Well, no, I don't think I want it." He insisted, he said he wanted twenty-five dollars, so I told him no. So I think finally he finally came down to seventeen or eighteen and so I bought it from him. So I asked the proprietor again if I could set this nickel machine beside where the penny one was and he said, "Go ahead." This time he sold it was about five o'clock in the afternoon—

Q. To interrupt you, Mr. Calderon, from that

(Testimony of Edward B. Calderon.)

time on gradually you got into the coin operated machine business, is that correct?

A. Well, I didn't want to go into that business. The only thing, when I bought that nickel machine that night I went home and when I came back in the morning he told me, "You had better get the nickels out because I am out of nickels." There was about eighteen or twenty dollars in there. I couldn't believe it because I was only making a dollar a day. I didn't think that was right, so I just didn't want to get [151] started on that. Finally I went for something next door to McLellan's—

Q. Anyway, Mr. Calderon, from that later you got other kinds of machines, didn't you?

A. Well, yes, this fellow kept coming back, then this other place where I had worked before as a dishwasher, they began asking me why I didn't buy those machines and put them in their places, so I did. I bought a couple more. I started the business that way. That was the way I got started. Can I go on?

Q. How long did you keep working at the Coney Island? A. Up to 1939.

Q. During that time you were operating your machines and continuing to work as a fry cook?

A. I kept on buying a few more machines, yes, sir.

Q. During that time did they finally stop the use of slot machines in Douglas, in that area?

A. Well, I think up to 1939, yes, just before the war started, yes, they did, those pinballs.

(Testimony of Edward B. Calderon.)

Q. In the meantime had you got any other kinds of machines?

A. Yes, I had acquired music boxes and automatic pinball machines and some of these cigarette penny vending machines.

Q. During that time did you have any central place of business at all?

A. No, I didn't have any place where I was doing any business [152] at all.

Q. Where did you repair these machines?

A. Right in the places, I would go in and fix them.

Q. Where did you keep your money?

A. I started to keep my money in my trunk at home.

Q. In your trunk at home? A. Yes.

Q. You mean right in your bedroom?

A. Yes, in my bedroom.

Q. Who kept your books for you during that period?

A. When I started this business when I first had to fix machines, merchants told me, "You have to get a States Sales Tax and City License." I didn't know how to do it so they told me and I got those. Then they began to tell me I had to have books so I could make these reports. I didn't know what to do because I didn't know anything about books, I don't know anything about them. I couldn't get them started. I finally thought of my brother's boss, Mr. Speer. I went and asked him and he said, "You go down to the drugstore and get a dozen of

(Testimony of Edward B. Calderon.)

those sales books, bring them down and I will show you how to make those reports and I will get you a set of books and keep them for you. Every night you leave your books here on top of my desk, your collection books, and leave any receipts, any invoices, anything you buy." He asked me if I had a savings account or any bank account. I said, "Yes, I [153] have a savings account in the Bank of Douglas." He said, "You bring that, leave it there." And he advised me to get a checking account and I went ahead and did that. He started taking care of my books then, he is the one that got them started.

Q. He is the one that started your bookkeeping?

A. Yes.

Q. Do you remember what year that was in?

A. That was about 1936.

Q. Then Mr. Speer kept your books and records how long?

A. Until his health failed and it was about 1943, about the middle of 1943, yes.

Q. Who made out your income tax returns during that period?

A. Up to 1942 Mr. Speer did.

Q. I hand you Government's Exhibit 7, Eddie, being a savings account in your name and your wife's name in the Bank of Douglas. Do you remember when that was opened?

A. I think it was about 1940, I am not sure.

Q. Look at it. Do you remember?

A. 1935.

Q. Had you had a savings account prior to that?

(Testimony of Edward B. Calderon.)

A. In 1927 I had one but during the depression I took out the seventy-five dollars.

Q. You saved seventy-five dollars and you used it up during the depression? [154] A. Yes.

Q. Where did you keep your checkbooks and your bank books and things that had to do with your bank receipts, your bank deposits?

A. Mr. Speer had all those checkbooks and everything.

Q. After Mr. Verdugo took Mr. Speer's place in about 1942——

A. I think it was 1943, I believe.

Q. 1943? A. Yes.

Q. Where did you keep the checkbooks and bank books then?

A. When I went to hire Mr. Verdugo I told him I didn't know anything about the books, he would have to go see Mr. Speer because I didn't know anything about them. So Mr. Verdugo went to Mr. Speer. Mr. Speer handed him everything he had in the desk.

Q. Mr. Speer made Mr. Verdugo acquainted with everything that had been done up to that time?

A. Yes.

Q. At that time where were you doing business, did you have a central place of business?

A. I started to fix my machines right in back of Speer's confectionary, in the same building.

Q. That was just north of 11th Street in Douglas?

A. It is in the 1100 block, in Douglas, yes.

(Testimony of Edward B. Calderon.)

Q. On G Avenue? [155] A. On G Avenue.

Q. Where did you keep your bank books and your business records in that office?

A. On top of my desk.

Q. Was that desk used by Mr. Verdugo at any time?

A. At first he started using it right when Mr. Speer turned over the books, he left everything on top of my desk, told me to leave everything like that and he would come down every eight days and take care of the books.

Q. Did he keep that up or did he later have you bring them up to his home?

A. When he first started he kept going there every two or three weeks, then he fell down to about a month, he didn't show up, up to the time I had to go to the hospital, then he told me to wrap up the— at the time I had to go to the hospital I called him, I wanted to tell him I had to go to the hospital. So he told me to leave everything like he had always done it, to leave everything on the desk. But he said "It will still be better if you have the boys wrap up these invoices every month and send them to my house so I can keep the books better there."

Q. Did you turn everything and all your receipts and all your invoices and everything you had over to Mr. Verdugo from time to time just as you had with Mr. Speer?

A. He told me right there, he said, "You don't have to [156] worry, just go to the hospital, I will do everything like you have done all the time. Have

(Testimony of Edward B. Calderon.)

the boys turn everything in here and you go ahead to the hospital and I will take care of your books."

Q. Calling your attention to the years 1942 through 1945 in Douglas, what was the condition of business generally in Douglas at that time?

A. 1942 to 1945?

Q. Yes.

A. That was the best years I ever had in my line of business on account of the Air Base. Of course we couldn't buy any new equipment. We didn't have to spend too much money to buy equipment. All we had to do was take up money. The boys there at the Douglas Air Base helped the town and the smelter going at full blast, there was plenty of money at that time.

Q. During that time, however, slot machines as such were not allowed in your end of Cochise County, were they?

A. No, not in Cochise County but they were allowed at the Douglas Air Base.

Q. Did you have anything to do with those at the Air Base?

A. Yes, I remember buying about 1941, I bought thirteen or fifteen slot machines for one hundred seventy-five dollars and along with a few others I had them working at the Air Base.

Q. Where were they at the Air Base? [157]

A. At the N.C.O. Club and the Officers Club, most of the clubs at the Air Base.

Q. Did they finally buy those machines them-

(Testimony of Edward B. Calderon.)

selves and you service them or were they yours all the time the Air Base was open?

A. The only place that bought the machines was the Officers Club. The other places I had the consoles in there.

Q. Besides that you had how many music machines, do you recall?

A. I must have had at that time about thirty-three machines, I imagine.

Q. How many?

A. I must have had thirty-three or thirty-four music machines.

Q. Can you give us any idea how many pinball machines you had and so forth?

A. All over, you mean in the town and the Air Base?

Q. Yes.

A. I recall at least about ten at the Air Base and maybe—the pinballs, you are talking about?

Q. Yes.

A. Because the slot machines weren't allowed in town. We had pinball machines, I must have had twenty or thirty, pinball machines, I imagine.

Q. So during the years 1942 to 1945 were you able to buy new equipment? [158]

A. 1942 to 1945?

Q. Yes.

A. No, there was no equipment available at all. We had to buy anywhere we could, just used machines. And we were buying pinballs as cheap as twelve and fifteen dollars, the pinballs. But the slot

(Testimony of Edward B. Calderon.)

machines, they ran maybe forty or fifty dollars.

Q. And music machines weren't available at all?

A. No. I remember I bought some, maybe a hundred fifty or a hundred and twenty-five dollars.

Q. When did you stop keeping your money at home in the trunk?

A. The first when I first started my operation, you know, about 1935 or 1936.

Q. Yes, then when did you stop doing that?

A. When did I stop?

Q. When did you get a safe?

A. It was about four—this safe I was using belonged originally to Mr. Speer and when he was sick and went to the hospital about 1944 or 1945 he went ahead and let me use the safe. That was when I transferred my money to the safe.

Q. Did your business require you to keep large amounts of cash and change in that safe?

A. Yes, sir, it did. It seemed like the Air Base and all these places depend on me to give them change and I had to have a lot of change. [159]

Q. Also, Eddie, over the years while you were keeping your money at home in the trunk had you formed a habit in regard to depositing money, did you deposit all your money?

A. Occasionally I would, yes.

Q. How did you do that? Tell the Court and jury how that happened.

A. During the time—

Q. All the time, the habits you formed with the trunk.

(Testimony of Edward B. Calderon.)

A. Well, I would deposit money occasionally in my safe and in my checking account, not very often because I was very busy. I was working at the smelter too and at that time during those years the banking hours, the time I was working, I couldn't go to the bank so I made it especially when I could get to the bank and deposit those.

Q. After you had this safe down at Mr. Speer's did you continue that same practice?

A. About depositing it?

Q. Yes.

A. Yes. Occasionally I would take some down to the bank, some of my savings.

Q. As a result of that practice of yours did you build up quite a reserve of cash in your safe from time to time? A. Yes, sir, I did, sir.

Q. Well, can you give us any idea how much cash you had in that safe about the end of December, 1945, let's say? [160]

A. At the end of December, 1945, that was right after the war years, I could have accumulated maybe—I don't know, maybe sixteen or seventeen thousand dollars.

Q. Sixteen or seventeen thousand dollars?

A. Yes.

Q. During the year 1946 what did you do with that money, Eddie, do you recall?

A. By 1946, after the war, all this new equipment began to come in so we had competition and we had to rebuild our machines, restock them with new machines because by that time all this com-

(Testimony of Edward B. Calderon.)

panies began to let us have new machines and new equipment.

Q. Now then, during 1946 and the early part of 1947 did you reduce the amount of cash you had in your safe, do you recall?

A. Evidently I had to reduce the amount of cash, yes, because I had bought this equipment.

Q. By the beginning of the year 1949 or the end of 1948 what was your position in regard to the cash you had in your safe again?

A. All this new equipment I had bought in 1946 and some in 1947, by 1947, '48 and '49 then of course I started building up my cash again.

Q. At the beginning of the year 1949 do you have any idea how much cash you had on hand?

A. I did not get your question. [161]

Q. At the beginning of the year 1949 do you have any idea how much cash you had on hand?

A. At the beginning of 1949?

Q. Yes. No, at the end of 1949.

A. Well, I don't think I had too much in cash, maybe three or four thousand dollars.

Q. Now, Mr. Calderon, during the years that Mr. Verdugo made your income tax returns for you did you ever have anything to do with keeping the books at all?

A. Nothing at all, no, sir.

Q. Who did you rely on to make these income tax returns?

A. Mr. Verdugo.

Q. And did you give him all the information you had and turn over to him all the receipts you took in?

(Testimony of Edward B. Calderon.)

A. Yes, sir, everything he wanted I turned it over to him.

Q. Were you ever approached by any of your customers to give them receipts which showed that you took less money out of their machines than you actually did?

A. The first time one of those merchants approached me that was about the beginning of—either the last of 1943 or beginning of 1944. I recall that because I was sick with my injured back and I went in to check the machines. After I got through checking and had my money counted out I started to make my receipt and the merchant told me, "Look, don't put down everything. After all, we are paying all these taxes and we [162] pay enough tax as it is." For one reason or another I didn't believe that was right so I told him, "I don't think that is right. I think I had better ask my bookkeeper before I do that." He kept arguing and I told him I couldn't do it. I finally went out and made the receipt the same as we had always done it. I didn't comply with his request the way he had asked me.

Q. Then what did you do? Did you discuss that with Mr. Verdugo at all?

A. I didn't discuss it right there but I kept in mind I had better ask him. So I would say about April I was walking and exercising my leg—

Mr. Flynn: Do you have the year fixed on this?

Q. What year?

A. About April 1944. I was exercising my leg

(Testimony of Edward B. Calderon.)

at the park one late afternoon and I saw Mr. Verdugo coming across the 10th Street Park. I hadn't seen him for three or four months. So I called him over and he asked me how I was. I told him I was pretty sick. It was the time I told him, "Look, there is a fellow asked me to——

Mr. Flynn: If the Court please, I would like to interpose an objection at this time on the ground that Mr. Verdugo was on the stand and he was not asked about this conversation on cross examination, no foundation laid for impeachment. And any statement or conversation related by this witness would be [163] clearly self-serving unless it would serve the purpose of impeachment. There was no foundation laid for impeachment.

The Court: I think Mr. Verdugo talked about the conversation he had about this same matter but it was later in time. I don't think this conversation was covered.

Mr. Herring: Counsel for the Government asked Mr. Verdugo, "Did he ever mention anything like this to you before?" Mr. Verdugo said, "No." Is there any particular reason for me to challenge Mr. Verdugo's statement? If he doesn't remember it I have the right now to show such a conversation did happen, both to impeach Mr. Verdugo and to make the issue on the statement which has been brought up. After all, the Government are the ones that brought this issue up.

Mr. Flynn: If counsel contend there was any conversation at that time, while Mr. Verdugo was

(Testimony of Edward B. Calderon.)

on the stand it was his duty to give him an opportunity to ask him an impeaching question. A fundamental rule of impeachment, you have to give the man on the witness stand an opportunity to say what was said. That is the only way to lay a foundation for impeachment.

Mr. Herring: I very carefully listened and when Mr. Flynn asked him if anything like that was ever said before and he said, "No," I presumed he had either forgotten it or he was testifying to something he thought hadn't taken place, didn't remember, and I would have a right to put on the evidence of this man. There is no point in asking Mr. Verdugo that as I [164] saw it.

The Court: As a basis of his admission of his impeachment, you can't go into it unless you gave Mr. Verdugo an opportunity by directing his attention to the particular time and place and conversation. The objection will be sustained.

Q. I take it, Mr. Calderon, then that you did discuss this matter of cutting down the receipts given to your customers, you did discuss that with Mr. Verdugo? A. I did, sir.

Q. In what year?

A. 1944. That was the first time I asked him about that.

Q. Now then, Mr. Calderon, when was the first time that anyone brought to your attention your income tax returns might be faulty?

A. When was the first time?

Q. That is right.

(Testimony of Edward B. Calderon.)

A. I didn't get that question again.

Q. Well, who first called to your attention the fact that the Government might claim more tax than you had paid them?

A. Nobody did, there was anybody that called it to my attention. The first time that I noticed, that I more or less had an idea that I should have paid taxes was the first year Mr. Verdugo told me I didn't have to pay any taxes.

Q. He told you you didn't have to pay any at all?

A. That is right. [165]

Q. Do you remember what year that was?

A. I believe that was for the year 1946.

Q. What year did the conversation take place then?

A. That took place at his house.

Q. In the spring of 1947?

A. In March 1947, yes, for the year 1946.

Q. What was said at that time and place?

A. He called me up about March the 12th and he said he would like for me to come up, he would like to ask me a lot of questions on my papers, on my returns. So I went up there that night, March the 12th, about eight o'clock. When I walked in he had a big stack of invoices and cancelled checks and other paper on top of his desk. He says, "I am going to have to ask a lot of questions. You remember what this invoice was for? Do you remember whether the serial number of the machines or do you remember what machines you returned?" I couldn't remember. I told him some of them I probably could. Then he said, "Well, do the best

(Testimony of Edward B. Calderon.)

you can anyway. It is all right." I told him, "All right." Then he brought out the checks, a lot of checks he had there on my cancelled checks for this whole year, some of them, he didn't show them all, but some of them. He told me, "Do you remember what this is for?" I told him, "Gene, I have been sick in bed most of the year on account of my leg. I can't tell you everything because I can't remember it. I know you told me to do that [166] and that is the way I done it." He said, "Well, do the best you can, it is all right." Well, I did the best I could to remember all those invoices he had there. Then he said, "How about your rent?" He said, "How much do you charge for this place?" And he put it down. "How much do you charge for this other place?" He would put it down and multiply it by twelve. And on down the different places I had for rent there. He said, "That is all right, I have everything now." Of course it took about an hour or so on these things, maybe more than an hour. He said, "I will call you up. I have to rearrange these, fix it up, and I will call you up as soon as I get it straightened out." On March 15th he called me up and he said, "I got everything all set." So I went up there. He had a long table of numbers he had and he brought out what he called a breakdown, a big sheet, then he started telling me so much for taxes, so much for insurance and all those. He says, "What do you think?" I said, "I don't know, Gene, I can't understand it. I figure you are the one." He said, "You turned in every-

(Testimony of Edward B. Calderon.)

thing you have done, everything the way I told you?" I said, "Yes, I have done everything the way you told me." He got hold of my income tax papers and looked through them and he began asking me how many kids I have. When he got through, "You think that is all right?" I told him, "I don't know, I can't understand it."

Q. Did you owe any tax as a result of it? [167]

A. After he told me that I said, "I don't understand it. All right then, how much taxes do I have to pay?" I asked him. He said, "No, you don't have to pay any taxes." I said, "I don't understand it. I don't know, maybe it is right. Of course I know I have had hospital bills."

Q. What?

A. I had hospital bills. I had been in bed. I didn't know much about sending these invoices up there. I thought, "Well, as long as I knew I turned in everything he told me I figured that was right then." But I did ask him if I did owe any taxes and that is the first time it came to me.

Q. All right, then, after that did Mr. Webb or Mr. Tucker talk to you about your income taxes?

A. I don't know what you mean.

Q. When did Mr. Tucker and Mr. Webb talk to you about your taxes? When did you first know Mr. Tucker and Mr. Webb were after you, in other words? What happened?

A. The first time they were after me?

Q. That is right.

(Testimony of Edward B. Calderon.)

A. You mean the first time when they started to investigate me?

Q. That is right.

A. Mr. Tucker—first Mr. Lewis sent me a letter, the revenue man there.

Q. Do you remember what year that was in?

A. Yes, that was in 1950. He sent me a notice to go to his office, that he wanted to talk to me about this invoices and papers. So I went up there and he gave me his list of invoices and I don't remember, some other stuff he wanted me to get ready for him. I went back. I didn't know just where to get that data because I didn't know where Mr. Verdugo had it.

Q. Did Mr. Lewis tell you at that time something was wrong with your income taxes?

A. No, he didn't tell me. He told me to get these invoices and stuff ready.

Q. Who did you get them from?

A. I called Gene, Mr. Verdugo, and told him what he wanted. I told him I didn't know where to get it and I would pay him if he would help me get that stuff. He said he would be down that night and we would get these invoices and other stuff he wanted. He did come down that night and we went to looking for these 1946 invoices which he had had at his home. So we looked for those three boxes of invoices we had brought down from his home into my place of business there. We went through there and we kept looking for this 1946 invoices—some of these 1946 invoices he wanted—

(Testimony of Edward B. Calderon.)

and we couldn't find them. I said, "I know I remember I wrapped them up, they were tied up in a string and put them in this box." I said, "I know the boxes are still there, I haven't touched them." That [169] is the reason I thought we had better do it. I said, "We will have to turn in what we have here." So we were going ahead through all these invoices, what Mr. Lewis wanted among those. I noticed some of those invoices that had an "E." I said, "Why do you initial some of these things and some you don't?" He said, "No, that is not an initial, that means 'entered'." I said, "I noticed some of those don't have that 'E' on there." He said, "I notice that too. Well, we have to turn them in anyway." We got that ready for Mr. Lewis.

Q. You took that up to Mr. Lewis?

A. We got the stuff ready. We called Mr. Lewis like he told me. Mr. Lewis came down, he glanced at them and he said, "I haven't got time to check them over. Besides, you wouldn't know anything about it. Take them down to the lumber yard to Gene and I will go down and he can explain to me about the invoices." I did that, I took them down to the lumber yard and left them with Mr. Verdugo.

Q. When did you first see Mr. Tucker and Mr. Webb?

A. Mr. Verdugo called me up and said a fellow by the name of Webb had been down there and he wanted to see me over at the Post Office Building, he was going to give me a list of some more stuff he wanted. I went to the Post Office Building that

(Testimony of Edward B. Calderon.)

day. As I walked in Mr. Lewis was in one room, Mr. Webb was in the other. Of course I knew Mr. Lewis. I saluted him and he called my attention this was Mr. Webb in the other room. [170] Mr. Webb, I met him, shook hands with him. He told me what he wanted me to do.

Q. What did he want then?

A. He wanted some more reports for 1944, '45—'46, I mean—and 1949, some more data he wanted me to get for him.

Q. Did you get it for him?

A. He made me a list of what he wanted up there. That night of course I went to Mr. Verdugo again and told him we had to get all this other stuff for him. So that night Mr. Verdugo called me up and he said, "I want to see you." After I got off work I went up there and I said, "Look, Gene, what is going on here? I don't know, I don't understand. I have done everything the way you have told me." And he said, "I don't know what these fellows want now." So I said, "But after all, you said you had done your job. I know I have done mine the way you told me. So all we have to do is turn these books over to them. After all, they are the Government."

Q. Speak louder.

A. I told him, "After all, there is nothing wrong. I have done everything the way you told me and they were the Government and I want to do everything right. I always did." So we went to work that night and got all this other stuff.

(Testimony of Edward B. Calderon.)

Q. When did you first see Mr. Tucker?

A. Mr. Verdugo then called me up. Mr. Tucker had been down there, a gentleman by the name of Tucker, and he wanted to see [171] me over at the Post Office Building. So I went up there when Mr. Tucker was there and Mr. Webb.

Q. Mr. Verdugo there too?

A. Not that time, no. So they began to ask me a lot of questions about how much I gave my dad and mother.

Q. About what?

A. About how much I gave my family.

Q. Yes.

A. I can't recall, but there were a lot of other questions asked me by them. I furnished everything they wanted. If I am not mistaken at that time they asked me where I had gotten this money and if I had inherited some money or if I had gambled or if I had played the stock market. I told them, "No, I have just made it with my machines and all that. I have broken my back doing it, but I have done it. I have been working maybe eighteen or sixteen hours a day, but I have done it myself."

Q. Did they tell you that they were going to make a case against you for income tax fraud?

A. Not at that time.

Q. Now then, you saw them three or four more times in the course of these conversations?

A. I saw Mr. Tucker, I guess, three, and Mr. Webb four times.

Q. Did you always do just exactly what they

(Testimony of Edward B. Calderon.)

wanted you to do? [172] A. Yes, I did.

Q. Give them all the information they wanted?

A. Yes, sir.

Q. Did they ever ask you, Mr. Calderon, how much money you kept in your safe?

A. No, they never did, sir.

Q. They did ask you how much money you kept in your pocket?

A. I don't remember them asking me how much money I had in my pocket.

Q. Now, remember the day they brought you up there and showed you a piece of paper with a lot of figures on it? A. Yes, that was the 2nd.

Q. Was Mr. Verdugo there at that time?

A. Not in the morning. He was in the afternoon.

Q. You went up early in the morning and were there all day?

A. I was there early in the morning, yes.

Q. Did they discuss all the figures that were on the sheet with you?

A. They showed me all the figures and went through all of them with the cancelled checks year to year, yes.

Q. Did you understand what they were doing, what they were talking about?

A. No, sir, I didn't understand.

Q. Did either one of them finally ask you to sign that statement, that bunch of figures? [173]

A. I believe Mr. Tucker did.

Q. What did you say?

(Testimony of Edward B. Calderon.)

A. I told him I didn't know whether it was right or not but my bookkeeper said that was about right and he said it was right but I didn't know whether it was right or not.

Q. What did he say?

A. He said, "Well, whether you sign it or don't sign it I am going to send it in anyway." I don't remember whether he told me anything about my Constitutional rights.

Q. Because he said it was right you signed it?

A. Well, yes. Mr. Verdugo said it was right.

Q. Mr. Calderon, have you ever deliberately failed to pay any of your taxes or any of your obligations you have ever had in your life?

A. No, sir, I have always wanted to pay everything that I owed.

Q. When you signed these income tax returns that Mr. Verdugo prepared for you did you have any idea that they were wrong in any particular?

A. No, sir, I had no idea because he said they were right.

Q. Mr. Verdugo said something about having a conversation with you about some receipt books that were lost. Do you remember that?

A. Mr. Verdugo?

Q. Yes. He said that you and he had a conversation about [174] some receipt books that were lost.

A. Oh, that was in 1950, I believe.

Q. Was that after this investigation started?

A. That was after, yes, 1950.

Q. As a result of that conversation what hap-

(Testimony of Edward B. Calderon.)

pened with these receipt books, did you number them?

A. He suggested we put a number on them. So he made that practice of putting a number on them. I also had an extra man I had hired so as to see if I could get better tab on my business. I asked them every time they get a book they put on a number according to each book. Before I knew it they had three or four books out that didn't have any number on them. I called their attention again, told them Mr. Verdugo wanted us to go ahead and number these books. Before I knew it again one of those numbered books was missing. I asked the boys where was this book and nobody seemed to know about it. It was maybe two or three weeks, I don't know now, one of the boys brought that particular book. He said he had forgotten it back in his hip pocket, put it away in the closet. Again later on we missed another of those numbered books, nobody seemed to know anything about it. Finally a place in Naco called up and said one of those books they had checked with was laying up there back of the counter. I don't remember just how long it was since we had lost it.

Q. As I take it then, these receipt books, except the [175] numbering, were the same procedure you had been following ever since you started in business?

A. Yes, sir.

Q. In a period of about three or four months you lost two of them, is that right?

(Testimony of Edward B. Calderon.)

A. Yes, more or less, after he told us to number them.

Q. Did you have a discussion with Mr. Verdugo about how much might be involved in each of these books?

A. Yes, we did.

Q. What was that?

Mr. Flynn: We object to that as self-serving.

The Court: No, he may answer. I believe Mr. Verdugo testified about that.

Mr. Herring: That is right.

A. We figured there was eighteen hundred or two thousand dollars would be put into one of those books.

Q. That it would make that much difference in the return of your income if you lost one of those books?

A. Yes. Again during 1950, as close as we followed those books, we lost one during that year and Mr. Verdugo said, "Well, all you have to do now is get an average from one month to the other and you can tell how much it is."

Q. During these years, where was the passbook for your savings account kept?

A. When I first turned it over to Mr. Speer he kept it on [176] top of his desk. When Mr. Speer turned it over to Gene we put the books on top of the desk and my checkbook and savings account book and my other account book in my drawer in the desk.

Q. Who had access to those books all the time?

A. He would come over. He just told me to

(Testimony of Edward B. Calderon.)

leave everything right there. I told him where I was going to put them.

Mr. Herring: That is all.

Cross Examination

Q. (By Mr. Flynn): Mr. Calderon, you testified on direct examination in 1943 you had about thirteen machines at the Air Base. What kind of machines were those, regular slot machines?

A. Slot machines, yes.

Q. You had about thirty-four music machines. Where were they located?

A. In various parts of town and some at the Air Base.

Q. You had about twenty pinball machines. Where were they located?

A. Various parts of town and some at the Air Base.

Q. Did you acquire any more machines in 1944?

A. Not too many. I would say very few.

Q. About 1945 did you acquire any machines?

A. We couldn't get many machines at all, just a few.

Q. You acquired some in 1946? [177]

A. Yes, we did.

Q. When did the Air Base close down and the machines taken out of there?

A. About the end, maybe about the beginning of 1946.

Q. Did you take your machines out of there then? A. Yes, we did.

(Testimony of Edward B. Calderon.)

Q. In addition to that you bought a lot more machines in 1946?

A. We replaced a lot of equipment in 1946, yes.

Q. How many did you buy in 1946?

A. I have no idea. We had to replace quite a few of them.

Q. Would you say about sixteen thousand dollars worth? A. Yes, I imagine so, sir.

Q. Where did you put those machines?

A. Replaced them around town.

Q. Around town? A. Yes.

Q. That was after business had dropped off and the Air Base had closed you were still buying machines? A. Yes, sir.

Q. Did you buy any machines in 1947?

A. I probably bought a few of them, sir.

Q. You say at the end of the year 1945 you estimate you must have had about sixteen thousand dollars in your safe in cash?

A. More or less, yes, sir. [178]

Q. Did you count it?

A. No, sir, I wouldn't say I did.

Q. Where did you acquire that sixteen thousand dollars?

A. This machines business.

Q. Acquire that in 1945?

A. Yes, all during those years.

Q. How much did you have at the end of 1944?

A. How much?

Q. Yes. At the beginning of 1945 how much did you have in your safe?

(Testimony of Edward B. Calderon.)

A. Well, I wouldn't exactly know, I could have had maybe twelve or thirteen thousand dollars.

Q. You didn't buy any machines in 1944?

A. No, not to amount to anything.

Q. You are just estimating that, you don't have any personal recollection at this time or know exactly how much money you had in your safe at any time, do you?

A. Sometimes I would count it, maybe once or twice in a year.

Q. You would deposit it off and on in your savings account and your checking account, wouldn't you?

A. Yes, I did, sir.

Q. Now, you think this sixteen thousand dollars you think you had in your safe at the end of the year 1945, that was accumulated over what period of time?

A. Between the years 1939 up to that time, I imagine. [179]

Q. You kept adding to it all the time?

A. You know, more or less.

Q. You took some out? A. Yes, sir.

Q. Do you know how much you made in 1945, how much you accumulated in 1945?

A. During that year?

Q. Yes.

A. I didn't know for any certain year, I have no idea.

Q. You testified on direct examination that was a good year, business was good.

A. From 1942 up through 1945, yes.

(Testimony of Edward B. Calderon.)

Q. And during the whole year 1945?

A. That probably was a fair year. That was the end of the war.

Q. Do you know how much you returned on your income for the year 1945?

A. No, I don't, sir.

Q. Do you recall that?

A. I didn't get your question.

Q. How much did you show on your income tax return for 1945, your receipts during that year, your income for 1945?

Mr. Herring: Your Honor, it is quite obviously impossible for the witness to remember a detail like that. The returns are in, they are the best evidence in any event. I object on [180] the ground the income tax returns themselves would be the best evidence.

The Court: This is in regard to the amount he returned in a particular year?

Mr. Flynn: Yes.

The Court: The return is the best evidence.

Mr. Flynn: May this be marked for identification.

(Government's Exhibit 12 marked for identification.)

Q. Mr. Calderon, I show you Government's Exhibit 12 for identification and call your attention to the signature there and ask you if you signed the original of that document?

A. Yes, I did, sir.

(Testimony of Edward B. Calderon.)

Q. Is that a copy of the income tax return you made for the year 1945?

Mr. Herring: Your Honor, the income tax return for 1945 is in evidence, the original.

Mr. Flynn: No.

Mr. Herring: I see.

A. Yes, sir.

Q. That is a copy of the return you made in 1945? A. Yes, sir.

Mr. Flynn: We offer it in evidence.

Mr. Herring: No objection.

The Court: It may be admitted.

(Government's Exhibit 12 in evidence.) [181]

Q. Mr. Calderon, calling your attention to the figures on this return which you say you made for 1945, I will ask you if that net profit, \$2,336.20, correctly reflected your net income for that year to the best of your knowledge.

Mr. Herring: Your Honor, I fail to see the relevancy of that. I don't see how that is relevant to this investigation at all in any way, shape or form. The man has testified Mr. Verdugo made out these accounts, these returns. He has no way of knowing whether it is correct. Probably it isn't, but whether it is or not he is not on trial for this.

The Court: This is offered for the limited purpose the witness has testified as to the fact 1945 was a good year, the years 1942 to 1945 were good years. Now his return is introduced here in evidence and has a bearing on that testimony. In other words, the jury will give it what weight it should

(Testimony of Edward B. Calderon.)

have as opposed to his testimony that these were good years. There is no question about the accuracy or any liability for this return, any criminal liability for this return.

Mr. Herring: He is not on trial for the year 1945 or any other year other than '46, '47, '49 and '49.

The Court: That is right.

Q. Would you answer that question?

A. Mr. Verdugo told me that was right.

Q. As far as you know it was?

A. As I was told, yes. [182]

Q. As far as you know this correctly reflects your gross income for that year, the deductions and everything?

Mr. Herring: I think, your Honor, the witness has answered the question. I object to it on that ground. He says Mr. Verdugo told him that was right.

Mr. Flynn: I want to ask a question as to the entire report.

The Court: He may answer the question.

A. As I was told, yes.

Q. As far as you know that was a correct return of your income and your deductions?

A. Yes, sir, as far as I was told, yes.

Mr. Flynn: May this be marked for identification.

(Government's Exhibit 13 marked for identification.)

Q. I show you Government's Exhibit 13 for

(Testimony of Edward B. Calderon.)

identification, which is a photostat, call your attention to the signatures there and ask you if that is a photostat of your signature which you placed on the original of that document. A. Yes, sir.

Q. Is that a copy of the return which you made, income tax return for the calendar year 1944?

A. Which Mr. Verdugo made for me.

Q. That was the one you signed and filed with Internal Revenue? A. Yes, sir. [183]

Mr. Flynn: We offer it in evidence.

Mr. Richey: No objection.

The Court: It may be admitted.

(Government's Exhibit 13 in evidence.)

Q. Mr. Calderon, this Government's Exhibit 13 in evidence which you say is a photostatic copy of an income tax return you made for the calendar year 1944, I call your attention to the item on the second page of this exhibit entitled "Total Receipts" of \$9,266.83. I will ask you if you could state whether or not to the best of your knowledge that was a correct statement of your receipts for that year. A. To the best of my knowledge?

Q. Yes.

A. Yes, to the best of my knowledge.

Q. Your net income for that year, your taxable income, calling your attention to the item \$4,162.50, to the best of your knowledge was that a correct report of your net and taxable income for that year?

A. I don't understand this, Mr. Herring.

Mr. Herring: I don't think Mr. Flynn does either, your Honor. I think the question is entirely

(Testimony of Edward B. Calderon.)

inadvertent but I want to point out to Mr. Flynn—

Mr. Flynn: You don't need to point out anything to me. I am talking to the witness. I want to know if this item which purports to report your net taxable income, does that [184] reflect your statement?

Mr. Herring: In other words, was that what Mr. Verdugo told you?

Mr. Flynn: Will you let me examine the witness, please.

The Court: Don't interrupt him.

A. I don't understand those.

Q. You don't understand? A. No, sir.

Q. Now, Mr. Calderon, when you were in the Post Office Building there in Douglas and they showed you these figures, you testified to that on direct examination, did they go over these figures item by item and tell you what they represented? They went over them, for instance, they pointed out to you for the year 1945, for instance, that you had in your checking account in the Bank of Douglas \$688.00, did they point out to you these figures represented what you had in your checking account?

A. They pointed out to me but I didn't understand very well.

Q. They pointed out to you all the other bank deposits shown on this? A. Yes, sir.

Q. Did they also point out to you the item United States Treasury Bonds in the sum of

(Testimony of Edward B. Calderon.)

\$5,181.25, represented the bonds and reflected the amount of bonds you held at that time?

A. They pointed everything out at that time.

Q. Did they also discuss with you the value of your furniture and fixtures which were reflected in those figures at about \$944, was that discussed, pointed out to you?

A. Although I didn't understand it, they did point it out.

Q. When they told you your furniture and fixtures were valued at \$944 you didn't know what they were talking about, is that right?

A. I don't know anything about value.

Q. When they got down to equipment and machinery which referred to the machines you had, and they told you these figures for the year 1945, the end of 1945, show that you had machines at that time of a value of \$8,000, did you understand that?

A. They showed me, but I couldn't put those things together.

Q. When they told you your automobiles you owned at that time were valued at \$1,855, did you understand that?

A. They pointed it out to me.

Q. They pointed that out?

A. Yes.

Q. When they told you you owned land of the value of \$2,300, did you understand that?

A. Yes.

Q. And that you had buildings on these differ-

(Testimony of Edward B. Calderon.)

ent pieces of land that you owned of the value of \$8,120, you understood that? [186]

A. They pointed that out to me.

Q. Now, they went through the other items on this list—

Mr. Herring: Now, your Honor, quite apparently Mr. Flynn is going to continue to testify from some foolscap sheet he has in front of him. I think if he is it should be put in evidence.

Mr. Flynn: I don't have to put my notes in evidence, your Honor. I have notes on here I am not going to put in evidence that I am going to ask him about.

Mr. Herring: I don't believe Mr. Flynn is testifying from his notes. I think they should be put in evidence because quite apparently no one, including any member of the jury, can carry these figures in his head. If Mr. Flynn is going to testify from them with great celerity I think they should be where everybody can see them, in an exhibit.

Mr. Flynn: These figures have all been testified to, your Honor.

The Court: The objection will be overruled.

Q. They also discussed with you the amount of money you spent for living expenses that year, didn't they? A. At this particular time?

Q. When these figures were shown to you in the office that day.

A. That wasn't discussed, it was just shown to me.

Q. They didn't tell you what it was?

(Testimony of Edward B. Calderon.)

A. No. [187]

Q. They didn't tell you this item in here of living expenses, \$3,000, was what you told them you gave your wife, \$250 a month, was that explained to you?

A. Yes, I see that now.

Q. Did they also point out to you there was an item in here of doctor bills, they got the information from you?

The Court: Just a moment, Mr. Flynn. When you say "in here"—

Mr. Flynn: I will correct that, your Honor. That is correct.

Q. When they told you on those figures they showed you in that office that day there was an item of doctor bills you paid, they got that information from you, didn't they, how much doctor bills you paid that year?

A. They didn't get that information from me, no, sir.

Q. Do you know where they got it?

A. They must have got it from the books, I guess.

Q. You didn't tell them how much you paid?

A. I don't know.

Q. Did they tell you how much the books showed you paid?

A. They didn't tell me anything about the books, no. They showed me this paper here, yes, sir.

Q. They showed you a paper up there with figures on it?

A. Yes, sir.

(Testimony of Edward B. Calderon.)

Q. They went through those figures item by item? [188]

A. They did. They pointed out both to my book-keeper and me, yes.

Q. Now, Mr. Calderon, do you recall a conversation with Mr. Verdugo some time in the early part of 1950, you heard him testify in Court this morning, of a conversation after this investigation started? Do you recall having a conversation with Mr. Verdugo in the early part of 1950 after this investigation started relative to your receipts from machines from the different locations?

A. About him telling me to number those books?

Q. No, this was after this investigation started, 1950.

A. Yes, 1950.

Q. You had a conversation with him?

A. About the books, yes, sir.

Q. Did you have a conversation with him at that time about these people who had these machines in their locations asking you not to return all the receipts that you received from them, all the money you received?

A. In 1950?

Q. Yes.

A. I don't recall, sir.

Q. You don't recall ever having such a conversation with him in 1950?

A. In 1950, no.

Q. You heard Mr. Verdugo testify to that this morning? [189]

A. I don't remember, sir.

Q. You heard him testify some time in 1950 he had a conversation in which you came to him and told him that these people had asked you not to

(Testimony of Edward B. Calderon.)

report all the money you received from them? Did you ever have such a conversation?

A. I had a conversation before 1950.

Q. Not in 1950?

A. Not in 1950, except these books that were marked. Those were the ones he told me about.

Q. Now, how many machines did you have operating in 1947 and 1948?

A. Well, I had less machines on account I had pulled out the ones from the Air Base, so that must have been maybe thirty-three or maybe twenty-eight music boxes. I had no way of telling.

Q. Did you have any pinball machines?

A. I had no way to know, but I had——

Q. Did you have more——

A. No, not more than when the Air Base was there.

Q. Did you have more than you had in 1945?

A. No, sir, I didn't.

Q. What did you do with those machines you bought in 1946, those sixteen thousand dollars worth of machines, what did you do with those?

A. We went around after they are obsolete, so old. [190]

Q. You don't know how many machines you had in 1947 or 1948?

A. Well, from what I can figure I had a little less at the Air Base, maybe twenty-eight or thirty machines.

Q. Those music machines?

(Testimony of Edward B. Calderon.)

A. I would say about twenty-seven music machines, and so on.

Q. How many pinball machines in 1948?

A. In 1948, pinballs did you say?

Q. That is right.

A. I imagine about twenty-five or twenty.

Q. You testified on direct examination in 1943 you had thirty-four music machines and about twenty pinball machines? A. That is right.

Q. So you had about as many or more than that in 1948?

A. But the machines weren't making as much money in 1948 as they were in 1944.

Q. They weren't running as much in 1946 either, were they? A. They had dropped a little.

Q. But you bought sixteen thousand dollars worth that year?

A. Yes, to replace my equipment.

Mr. Flynn: May we have a recess? I think I am about through, your Honor.

The Court: Very well. At this time we will take a recess. I think we had better recess for about twenty minutes and during that time I can talk to counsel about instructions. We will stand at recess, ladies and gentlemen, for twenty [191] minutes.

(Recess.)

Q. (By Mr. Flynn): Mr. Calderon, at the prior trial in this case you were sworn and testified in this Court? A. I did, sir.

Q. At that time on cross examination when you

(Testimony of Edward B. Calderon.)

were being questioned about 1946 if the following questions were asked you to which you made the following answers——

Mr. Herring: What page?

Mr. Flynn: 174.

“Question: Now at that time then did you continue to keep the money at home in your trunk?

“Answer: No, I put it in the safe.”

Did you make that answer to that question last time, do you recall?

A. I didn't get that question again, sir.

Q. I am asking you about your testimony at the other trial, Mr. Calderon, at which you were asked:

“Question: Now at that time then did you continue to keep your money at home in your trunk?”

Your answer was:

“Answer: No, I put it in the safe.”

The the following question was asked you:

“Question: How much money did you have in there from time to time, Eddie? [192]

“Answer: In the safe I didn't count it very often, just from time to time I would count it and there would be, oh, from two—maybe eight or nine thousand dollars, I imagine. I didn't count it all, just the paper money, but I had some change in there.”

You made that answer?

A. At that time, sir, during that trial——

Q. I am asking you if you testified to that at the last trial, then you can explain it afterwards.

(Testimony of Edward B. Calderon.)

A. Yes, I did, sir.

Mr. Flynn: That is all.

Mr. Herring: Mr. Flynn, might I have that Net Worth Statement you have been testifying from—excuse me, you have been reading from?

Redirect Examination

Q. (By Mr. Herring): Did you sign this, Eddie, is this your signature?

A. Yes, Mr. Herring.

Q. Is this the paper you signed for Mr. Webb and Mr. Tucker up there in the Post Office Building about the 2nd of August 1950?

A. Yes, sir.

Q. Is this what they showed you and this is what they did all that reading of figures to you from? A. Yes, sir. [193]

Mr. Herring: I offer it in evidence.

Mr. Flynn: No objection.

The Court: It may be admitted.

(Defendant's Exhibit B in evidence.)

Mr. Herring: May I have Government's Exhibit 10, that first photostatic income tax return?

Q. Now, Mr. Calderon, you were handed this exhibit by Mr. Flynn, being Government's Exhibit 12 in evidence, being a photostatic copy of your income tax return for 1945 and you said that was your signature on there, that is a photostatic copy of it, didn't you? A. Yes, sir.

Q. I call your attention to that exhibit. The first page of that exhibit shows you have a net

(Testimony of Edward B. Calderon.)

profit of \$2,336.20. That refers to the operation of the Coronado Cafe, doesn't it?

A. Yes, sir, that is right.

Q. There is another page of that exhibit which has to do with your music machine business, isn't there, Mr. Calderon? A. Yes, Mr. Herring.

Q. Both of them together made up your income for that year? A. Yes.

Q. Mr. Calderon, you started to explain something to Mr. Flynn when he read the questions and answers out of that previous trial from that book?

A. Just while ago, yes, I did. [194]

Q. You started to explain to him that you had two to nine to ten thousand dollars in the other trial and saying you might have had around sixteen thousand in the safe in this trial?

A. Yes, sir.

Q. Go ahead and finish your explanation.

A. Since that trial I began to think and I know definitely I hadn't made any deposits in my bank during those years, so I know now that I could have accumulated that much because I know I didn't have it in my bank. I put it mostly in my safe.

Q. And you had not been buying any machines as you stated?

A. We couldn't buy any machines, no, sir.

Q. Business was good?

A. Very good. Those were my best years in operation.

Q. Also, Mr. Calderon, in 1946 when you were

(Testimony of Edward B. Calderon.)

able to buy machines did you just buy machines and add them on to the ones you had or what did you do with your old ones?

A. Some of those old ones were traded in to the companies.

Q. Yes. At the end of that period, 1945 and beginning of 1946, what was the condition of your equipment?

A. It was very obsolete. It was old machines. We had to replace them.

Q. I see. Prices for equipment were high too, were they not? A. In 1946?

Q. Yes. [195]

A. Yes, sir, they went up considerably high.
Mr. Herring: That is all.

Recross Examination

Q. (By Mr. Flynn): You are sure this Net Worth Statement for 1946 showing you spent sixteen thousand dollars for machines had nothing to do with your changing your testimony about the amount of money you had in your safe? You didn't change your testimony merely because there was an item in here of sixteen thousand dollars in 1946 you spent for machines?

A. I know, I realize by that time since that trial that I must have had that money in my safe.

Q. You found out from this Statement you spent sixteen thousand dollars in 1946—

A. I can't understand the Statement.

Q. You found out in Court here from this State-

(Testimony of Edward B. Calderon.)

ment represented you had sixteen thousand dollars you spent for equipment in 1946, didn't you?

A. Yes, that was read to me.

Q. That was when you decided you must have had sixteen thousand dollars in the bank or in your safe rather on the 1st of the year?

A. I didn't decide it, sir. I knew——

Q. How did you figure it out?

A. Because we had very good years all from 1939 up to 1946, [196] sir.

Mr. Flynn: That is all.

Mr. Herring: No questions. The defense rests.

Mr. Flynn: The Government rests.

Mr. Herring: I would like at this time to renew my motion I made at the close of the Government's case and move that the case be dismissed.

The Court: The motion will be denied.

You may proceed with the argument.

(Arguments of counsel.)

The Court: Ladies and gentlemen, the evidence has been submitted to you now and counsel have argued the case. At this time it is the Court's duty to instruct you as to the law.

It is your duty as jurors to follow the law as stated in these instructions and to apply the law as given to you to the facts as you find them from the evidence before you.

You are not in considering the instructions and applying them to single out any single instruction, but you are to take the instructions of the Court as a whole as being the law of the case.

Regardless of any opinion you may have as to what the law ought to be it would be a violation of your duty to base a verdict upon any other view of the law than that given you by the Court in the instructions.

To begin with, you are instructed that an indictment— [197] there is an indictment in this case—is only a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and does not create any presumption or permit any inference of guilt. The law presumes a defendant to be innocent of any crime. This presumption of innocence continues throughout the trial and has the weight and effect of evidence in favor of the accused. You must consider the evidence in light of this presumption. The presumption of innocence is sufficient to acquit a defendant unless the presumption is outweighed by evidence satisfying the jury beyond a reasonable doubt of the guilt of the defendant.

Reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such that you would be willing to rely and act upon it in the most important of your own affairs. The defendant is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence.

Since the burden is upon the prosecution for the

Government to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, the defendant has the right to rely upon a failure of the Government to establish such proof. The defendant may also rely on evidence [198] brought out on cross examination of witnesses for the prosecution.

The law does not impose upon the defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all of the evidence, the jurors do not feel satisfied to a moral certainty that a defendant is guilty of the charge.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense. As a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In order to justify a verdict of guilty based in all or in part upon circumstantial evidence the facts in the chain of circumstances shown by the evidence must be consistent with the guilt of the accused and inconsistent with every reasonable supposition of innocence. If the facts and circumstances shown by the evidence are as consistent

with innocence as with guilt, the jury should acquit the defendant.

You as jurors are the sole judges of the credibility of [199] the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. This presumption may be outweighed by the manner in which the witness testifies or the character of the testimony given or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other witnesses. Inconsistencies or discrepancies in the testimony of the witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear differently and innocent misrecollection like failure of recollection is not an uncommon experience. In weighing the effect of the discrepancy consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will

give the testimony of that witness such credibility, if any, as you [200] may think it deserves.

The defendant who wishes to testify is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness. All evidence relating to any admission or incriminatory statement claimed to have been made by the defendant outside the Court should be considered with caution and weighed with great care. Where a defendant has offered evidence of good general reputation for truth and veracity or honesty and integrity or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case. Evidence of a defendant's reputation as to those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both the act and the intent beyond a reasonable doubt. Section 145(b) of Title 26 of the United States Code—and that is what is commonly called the Internal Revenue Code—provides in part that any person who willfully attempts in any manner to evade or defeat any tax imposed by this Chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. Each of the four [201] counts of the indictment in this case charges the

defendant with a separate violation of the statute which I have just read to you.

It is charged in Count One of the indictment that on or about the 10th day of July, 1947, in this District the defendant Edward Calderon willfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona a false and fraudulent joint income tax return on behalf of himself and his said wife, for it was stated that their net income for said calendar year was the sum of \$3,836.68 and that the amount due and owing thereon was the sum of no dollars, whereas the defendant then well knew that their joint net income for the calendar year 1946 was the sum of \$24,855.49, upon which income there was owing the United States of America an income tax of \$7,352.12.

I have stated in detail the first count of the indictment, and that involves the return for the year 1946 as filed within the year 1947.

The three remaining counts involved succeeding years, in other words the year 1947 the return for which was filed in '48, the year 1948 the return for which was filed in '49, and the year 1949 for which the return was filed in 1950. [202] Except for the amounts—and you will remember that the indictment was read to you—except for amounts the charge to each year is the same. In other words, in

an attempt to willfully evade and defeat the tax due from the defendant and his wife he filed false and fraudulent income tax returns in which he stated his income to be a certain amount and that there was no tax due thereon, when in truth and fact, as he knew, his income was a different amount, a greater amount and there was an amount of tax due. Those are in essence the charges in each of the several counts.

Now you are instructed—and this instruction is important because it will tell you what elements there are in the offense charged in each count, and I am here attempting to tell you what the Government must prove to you beyond a reasonable doubt with reference to each count of the indictment—you are instructed that there are three essential elements of the offense which is charged against the defendant in each count of the indictment in this case.

First, that the defendant filed or caused to be filed with the Collector of Internal Revenue for this District as charged in the indictment a joint income tax return for himself and his wife in which return he understated the income of himself and his wife for the year covered by the return, and stated that there was no income tax due from the defendant and his wife to the United States of America for the year covered [293] by the return. That is the first element.

The second element is that in truth and in fact the joint net income of the defendant and his wife for the year covered by the return filed or caused

to be filed by the defendant was an amount substantially in excess of the amount stated in the return, and that in truth and in fact there was a substantial amount of income tax owing from the defendant and his wife to the United States of America on account of their true joint income in the year covered by the return, all of which was known to the defendant at the time he filed the income tax return or caused it to be filed. In other words, that in truth and in fact the income, joint net income, of the defendant and his wife was in excess of that stated in his return and there was a substantial amount of tax due to the United States and the defendant knew those things when he filed the return. That is the second element.

Third, that the defendant willfully and knowingly attempted by means of the income tax return filed or caused to be filed by him to defeat and evade all or substantial parts of the income tax which was owing from the defendant and his wife to the United States of America for the year covered by the return.

As I have stated before, the burden is upon the Government to prove beyond all reasonable doubt every essential element of the crimes charged against the defendant by the indictment [204] in this case. In other words, as to any particular count of the indictment.

You are instructed that before you would be justified in returning a verdict of guilty upon such count the Government must have satisfied you from the evidence beyond all reasonable doubt of

the existence of each of the elements constituting the offense charged by such count, as I have stated those elements to you.

I have instructed you that one of the essential elements of the charge made by each count of the information to be proved by the Government beyond a reasonable doubt is that a substantial amount of tax was in truth and in fact due from the defendant and his wife to the Government. Now it is not necessary that the Government show that the defendant and his wife owed the exact amount of tax stated in the indictment, but it is necessary that the Government show beyond a reasonable doubt that a substantial amount of tax was in truth and in fact due to the Government from the defendant and his wife.

You will note that some of the acts charged in the several counts of the indictment are alleged to have been done by the defendant knowingly and willfully. I instruct you that an act is done knowingly if done voluntarily and purposely and not because of mistake or inadvertence or other innocent reason. I instruct you also that an act is done willfully if it is done voluntarily and purposely and with specific [205] intent to violate the law. Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the

state of mind with which the acts were done or omitted. What a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. Intent may be inferred from all the evidence in the case, including any acts done and statements made by the accused. Determining the issue as to intent the jury are entitled to consider all the facts and circumstances in evidence.

In this particular case the defendant has been prosecuted by the Government's presentation of what is termed a net worth statement, or net worth expenditure basis. The method of establishing net taxable income sought to be applied in this case is effective only if the computations of net worth at the beginning and the end of the questioned periods can be reasonably accepted as accurate. You ladies and gentlemen heard the testimony of Mr. Tucker, who is the man that presented the net worth statement, and you know from that testimony just exactly what its sources were and what his figures were. It will be for you to consider that evidence and to determine in your own minds whether the statement is dependable, accurate and reliable; but I have instructed you that that method of [206] establishing net taxable income is effective only if the computation of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate.

In each count of the indictment in this case it is the Government's charge that the defendant Edward B. Calderon did willfully and knowingly attempt to defeat and evade a large part of the in-

come tax due and owing by him and his wife to the United States of America. In this connection it would not be a willful intent to evade taxes unless the tax returns involved in this case were filed or caused to be filed by the defendant with the deliberate intention and criminal purpose of evading lawful taxes. Evidence of incomplete books, inaccurate records, errors of omission or commission, negligence or laxity in the keeping of books, or the necessity of reaudit would not alone be sufficient to establish guilt. But such evidence is important to be considered in determining whether it supports or corroborates other evidence of a criminal intent to escape the tax.

As you have noted, a separate crime or offense, that is, a separate violation of the same statute, is charged in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately, as though no other offense were charged. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not influence your verdict with respect to any other [207] offense charged.

The verdict—that is, your verdict—must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with the view of reaching agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after impartial

consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that it is erroneous. But do not surrender your honest convictions as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case and that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use good sense. Consider the evidence for only those purposes for which it has been submitted and give it a reasonable and fair construction. If the accused be proved guilty, say so; if not proved guilty, say so. Remember at all times that the defendant is entitled to acquittal if any reasonable doubt [208] remains in your mind. Remember also that the question before you can never be will the Government win or lose the case. The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Bailiff. But bear in mind you are not to reveal to the Court or to any person how the jury stands numerically or otherwise on the question of the guilt or innocence of the accused until after you have reached a unanimous verdict.

Upon retiring to the Jury Room you will select one of your number to act as Foreman, and the Foreman when selected by you will preside over your deliberations and be your spokesman in Court. A form of verdict has been prepared for your convenience in the case and omitting the formal parts of it it reads as follows:

We, the Jury duly impaneled and sworn in the above entitled action, upon our oath do find the defendant Edward B. Calderon blank as charged in Count One, and blank as charged in Count Two, Count Three, Count Four. In the blank space if—and this is as to each particular count, in the space provided on each count—if under the evidence and under the instructions of the Court as I have given them to you you should find the defendant guilty of a particular count, then the word [209] guilty will be inserted. On the other hand, if under the evidence and under the instructions which I have given you you find the defendant not guilty of a particular count, then the words not guilty will be inserted in the blank space as to that count.

You will take this form to the Jury Room and when you have reached a unanimous agreement as to your verdict you will have the Foreman fill it in, date it, sign it, state your verdict upon which you agree, and then you will return with the verdict to the Court Room.

Do counsel have any exceptions or objections in the instructions?

Mr. Herring: No, your Honor.

Mr. Flynn: No.

The Court: Very well. Will you swear the Bailiff, please.

(Bailiff sworn.)

The Court: Ladies and gentlemen, you will now retire in charge of the Bailiff.

[Endorsed]: Filed Dec. 16, 1952.

[Endorsed]: No. 13675. United States Court of Appeals for the Ninth Circuit. Edward B. Calderon, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: December 27, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States District Court for the
District of Arizona

[Title of Cause No. C-13083.]

**STIPULATION FOR PRESENTATION OF
ORIGINAL EXHIBITS ON APPEAL**

It is hereby stipulated, by and between the United States of America, through Frank Flynn, United States Attorney, by K. Berry Peterson, Deputy United States Attorney, and Richey & Herring, attorneys for the defendant appellant in the above matter, by Norman Herring, that all exhibits admitted in evidence, or offered in evidence and made a part of the Record on Appeal in this cause, may be considered by the Appellate Court in their original form without the necessity of reproduction in a formal Abstract of Record.

Dated this 24th day of December, 1952.

**UNITED STATES OF AMERICA,
FRANK FLYNN,**

United States Attorney for the Dis-
trict of Arizona,

/s/ By **K. BERRY PETERSON,**

Deputy United States Attorney

RICHEY & HERRING,

Attorneys for Defendant, Appellant

/s/ By **NORMAN HERRING**

[Endorsed]: Filed Dec. 31, 1952.

[Endorsed]: Received January 2, 1953. Paul P.
O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 13675

EDWARD B. CALDERON, Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

DESIGNATION OF RECORD AND POINTS
ON WHICH APPELLANT INTENDS
TO RELY

Comes Now the Appellant, by his attorneys undersigned, and designates the following Record as Material on Appeal or Review:

1. The Indictment.
2. The Record of Arraignment and Defendant's Plea.
3. All exhibits marked and received in evidence at the trial.
4. The complete Reporter's Transcript of Testimony and Proceedings.
5. The Minute Entries, made during and after the beginning of the trial, to and including the filing of the Notice of Appeal herein.
6. The Judgment of the Court and the sentence imposed.
7. Notice of Appeal.
8. Clerk's Certificate.
9. This instrument.

Points Upon Which Appellant Will Rely
on Appeal

I.

In the trial of this case the Lower Court erroneously permitted, oral and written admissions of the defendant to be introduced in evidence without independent proof of the corpus delicti of the crime charged.

II.

The "Net Worth Statement", as prepared by the Internal Revenue Agents, was testified to and the figures therefrom were received in evidence, although it affirmatively appeared from the testimony of the government witnesses that the original asset figures were erroneous and not based on fact.

III.

The defendant's Motion to Dismiss, and for a Directed Verdict, at the close of the Government's Case, should have been granted because the evidence did not make out the corpus delicti of the offense and because the Government's Case was based on conjecture, guess, and supposition from which a "net worth statement" had been created. There was no evidence corroborating the purely circumstantial evidence of the corpus delicti.

IV.

The Motion of the defendant for dismissal of the case and for a directed verdict, at the close of all

the evidence, should have been granted because there was not sufficient evidence to present to the jury. The evidence did not disclose that a crime had been committed; the evidence did not prove that the specific crimes charged had been committed; the evidence did not prove that the defendant had committed any of the crimes charged. A conviction will not be sustained, based on circumstantial evidence alone, where such circumstantial evidence does not exclude every reasonable hypothesis of the innocence of the defendant.

V.

The Verdict and Judgment of Guilty is not sustained by competent evidence.

Respectfully submitted,

RICHEY & HERRING,

/s/ By **NORMAN HERRING,**

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed January 8, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 13675

EDWARD B. CALDERON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of
Arizona

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Wednesday, July 29, 1953

Before: DENMAN, *Chief Judge*, HEALY and BONE, *Circuit Judges*

ORDER OF SUBMISSION

Ordered appeal in the above entitled cause argued by Mr. Norman Herring, counsel for the appellant, and by Mr. John Lockley, Special Assistant to the Attorney General, counsel for the appellee, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Friday, October 9, 1953

Before: DENMAN, *Chief Judge*, HEALY and BONE, *Circuit Judges*

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING
OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

EDWARD B. CALDERON, APPELLANT

v.s.

UNITED STATES OF AMERICA, APPELLEE

No. 13,675

October 9, 1953

Appeal from the United States District Court for the District
of ArizonaBefore DENMAN, *Chief Judge*, and HEALY and BONE, *Circuit Judges*.DENMAN, *Chief Judge*:

This is an appeal from a judgment of the United States District Court imposing fines and probation upon appellant upon conviction on four counts of income tax evasion.

The question here is whether admissions of Calderon were properly received in evidence absent any independent evidence of the crime of tax evasion.

Calderon operates a legitimate coin-machine business in Douglas, Arizona. He is charged with having failed to report all of the income from this business for the years 1946, 1947, 1948, 1949. The Government established the alleged excess income for these years by the "net worth" method, measuring the increase of net worth for each year. The items which went into a net worth statement prepared by the Government were stipulated to be correct with the exceptions of "Cash on Hand" and "Cash in the Bank."

The burden of proof is on the prosecution as to each pertinent starting item of the net worth statements to a reasonable certainty.¹ Absent such a starting item as, say, cash on hand the remainder of the statement proves nothing. Here there is no question as to the items "cash in bank" as to each of the four years. As to "cash on hand," that, at the start of the accounting period, must be low enough to combine with the other factors to show a greater income than reported.

Here the Government's computation rested on \$500 cash on hand

¹ *Bryan v. United States*, 175 F. 2d 223, 226 (Cir. 5); *United States v. Fenwick*, 177 F. 2d 488 (Cir. 7).

See also: *Guriepy v. United States*, 189 F. 2d 459, 463 (Cir. 6); *Brofella v. United States*, 184 F. 2d 823, 825 (Cir. 6).

at the beginning of 1946 and on that beginning amount the four years' charges of under reporting were made. At the trial a tax agent, a witness for the government, testified as follows:

"Q. Now, let's get back to this statement. You said, as I understand it, that if the cash on hand item as it appears in your net worth statement is in error then the whole thing is in error, that is right, isn't it?

A. It would affect it, yes. It wouldn't make any of the other items wrong or right.

Q. Just make the total wrong all the way through?

A. Yes, if the item was wrong.

Q. The total taxes, the total amounts Mr. Calderon is to be charged with would be wrong all the way through? It is true, isn't it?

A. Yes, sir.

Calderon contends there is no admissible evidence to show his charged understatements, since all the testimony concerning the cash on hand consisted of his extrajudicial admissions to the tax officials and to his tax consultant.

The Government claims that Calderon's sworn statement given the tax officials confessing the under-reporting of his income for the four years, which was introduced in evidence over the objection that the corpus delicti had not been shown, is not an extrajudicial admission. The contrary has been stated the law in *Pong Wing Quong v. United States*, 111 F. 2d 751 (Cir. 9); *Gulotta v. United States*, 113 F. 2d 683 (Cir. 8); *Yost v. United States*, 157 F. 2d 147 (Cir. 4).

Calderon took the stand and gave testimony of cash on hand on January 1, 1945, which conflicted with his testimony at an earlier trial. We agree with the Government's position that the jury rejected Calderon's testimony as a whole. Otherwise they would have had to acquit him on the charges for 1947 and 1948, since the lowest amount of cash on hand he stated made his returns for those years not understatements.

The only other evidence showing the charged understatements consists of Calderon's verbal statements to the tax officials and to his bookkeeper. *A fortiori* since such written statements are extrajudicial, these verbal statements are. They cannot be the basis of a conviction absent, as here, some independent proof of the corpus delicti. *Spriggs v. United States*, 198 F. 2d 782 (Cir. 9); *United States v. Chapman*, 168 F. 2d 997, 1001 (Cir. 7); cert. denied, 335 U. S. 853.

The judgment is reversed and a new trial ordered.

(Endorsed.) Opinion. Filed Oct. 9, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

EDWARD B. CALDERON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

No. 13675

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is reversed and a new trial ordered.

(Endorsed) Judgment

Filed and entered October 9, 1953, PAUL P. O'BRIEN, *Clerk*.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

Excerpt from Proceedings of Tuesday, December 8, 1953

Before: DENMAN, *Chief Judge*, HEALY and BONE, *Circuit Judges*.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof and by direction of the Court, It Is ORDERED that the petition of appellant, filed November 22, 1953, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing of above cause be, and hereby is, denied.

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

EDWARD B. CALDERON, APPELLANT

v/s.

UNITED STATES OF AMERICA, APPELLEE

No. 13675

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED
RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and twenty-two (222) pages, numbered from and including 1 to and including 222, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of the Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the original thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of January, 1954.

[SEAL.]

(S.) PAUL P. O'BRIEN, *Clerk*.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA, PETITIONER

VS.

EDWARD B. CALDERON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 6th, 1954.

(S.) WM. O. DOUGLAS,

*Associate Justice of the Supreme Court
of the United States.*

Dated this 5th day of January, 1954.

Supreme Court of the United States

No. 577, October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

Order allowing certiorari

Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.

F. J. LEWIS

FEB 4 1954

HAROLD B. WILSON, Clerk

No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

HAROLD B. CALDERON

APPEAL FROM A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	10

CITATIONS

Cases:

<i>Bell v. United States</i> , 185 F. 2d 302, certiorari denied, 340 U.S. 930	8
<i>Casey v. United States</i> , 276 U.S. 413	10
<i>Forte v. United States</i> , 94 F. 2d 236	7
<i>Gariopy v. United States</i> , 189 F. 2d 459	9
<i>Holland v. United States</i> , decided by Court of Appeals for the Tenth Circuit on January 21, 1954, 54-1 U.S. T.C., C.C.H. ¶ 9177	9
<i>Leeby v. United States</i> , 192 F. 2d 331	9
<i>Morrison v. California</i> , 291 U.S. 82	10
<i>Remmer v. United States</i> , 205 F. 2d 277, pending on writ of certiorari, No. 304, this Term	6, 9
<i>Rossi v. United States</i> , 289 U.S. 89	10
<i>Schuermann v. United States</i> , 174 F. 2d 397, certiorari denied, 338 U.S. 831	9
<i>United States v. Fleischman</i> , 339 U.S. 349	10
<i>United States v. Johnson</i> , 319 U.S. 503	6
<i>Warszower v. United States</i> , 312 U.S. 342	7, 8
<i>Wilson v. United States</i> , 162 U.S. 613	10
<i>Yee Hem v. United States</i> , 268 U.S. 178	10

Statute:

Internal Revenue Code:

Sec. 145 (26 U.S.C. 1946 ed., Sec. 145)	2
---	---

Miscellaneous:

Wigmore, <i>Evidence</i> , (3d ed.), Vol. III, Section 821(3), Vol. VII, Section 2074	8
---	---

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 577

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals reversing respondent's conviction under Section 145(b) of the Internal Revenue Code.

OPINION BELOW

The opinion of the court below (R. 218-219) is reported at 207 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1953. (R. 220.) A petition for rehearing was denied on December 8, 1953 (R. 220), and, on January 5, 1954, the time for filing

this petition was extended by Mr. Justice Douglas to and including February 6, 1954. (R. 222). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether, in a tax evasion prosecution based on proof of unexplained increases in net worth, the defendant's admissions as to the amount of cash on hand at the starting point require corroboration.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Respondent was indicted on October 29, 1951, in the United States District Court for the District of Arizona on four counts of willful attempted evasion of his own and his wife's joint income tax liabilities for the years, respectively, 1946, 1947, 1948 and 1949, in violation of Section 145(b), Internal Revenue Code. (R. 3-6.) At the trial before a jury, the Government established the alleged unreported income for the four years involved by the "net worth" method. (R. 218.) The assets and liabilities included in the net worth statement were stipulated to be correct with the exception of the items of cash on hand and cash in the bank. (R. 218.) To establish the amount of cash in the bank, ledgers covering the defendant's two checking accounts and two saving accounts were placed in evidence on the testimony of bank officials. (R. 34-49.)

Special Agent Tucker testified that he and Deputy Collector Webb prepared the net worth computation. (R. 52.) He stated they had attempted to reconstruct the defendant's net worth at the close of each of the years 1943 through 1949. (R. 61.) This reconstruction was based upon the agents' examination of the defendant's several bank accounts (R. 51); such business records as the defendant furnished them (R. 52); his cancelled checks; his returns; the working papers used to prepare his returns; invoices furnished by the defendant; records maintained by various coin-machine manufacturing companies, located in various parts of the country; records of an automobile company in

Douglas; records of Cochise County; working papers of defendant's accountant; deeds furnished by defendant (R. 66); and returns filed by him in prior years (R. 122). The agents determined that as of December 31, 1945, the defendant had visible assets totaling \$32,000. (R. 61.) Agent Tucker testified this total included all of the defendant's known assets. (R. 61.) On June 18, 1950, the agents discussed with the defendant his assets and liabilities for the years in question. (R. 56.) The defendant told them he had, as was his custom, approximately \$500 currency on December 31, 1945. (R. 57-59.) He also informed the officers of his age, the number of his children, and his household expenses (R. 57, 67), and identified certain expenditures (R. 64). The defendant also told the agents he had not received any gifts or inherited any money. (R. 108.)

The defendant signed the net worth statements prepared by the agents stating he had read them and that they disclosed his true net worth on the items indicated. (R. 123-125.)

Deputy Collector Webb testified that, based upon the preceding net worth statements, the defendant received the following amounts of income during the prosecution years: 1946—\$24,855.49 (R. 99); 1947—\$11,056.82 (R. 111); 1948—\$6,874.43 (R. 112); 1949—\$19,506.73 (R. 112). The amounts of income reported by the defendant for those years were \$3,836.68, \$3,663.93, \$3,590.73, and \$5,683.80, respectively (R. 3-6). Mr. Webb computed the tax due on these amounts of income actually received

by the defendant. (R. 99, 103, 104.) He testified that all of his computations of income and taxes were based upon the net worth statements in question and that if the items of cash on hand were changed, his computations would be altered. (R. 122.) Mr. Webb identified a statement which the defendant signed under oath on August 2, 1950. (R. 106-110.) In this statement the defendant admitted the understatements of income discovered by the agents as having resulted from a scheme for diverting the receipts of his coin machines. (R. 108-109.)

The defendant took the stand and testified that about 1939 he started keeping money in a trunk at home (R. 156-157); that in 1944 or 1945 he transferred his money to a safe in his office (R. 163, 194); that by 1945 he had sixteen or seventeen thousand dollars in his safe (R. 164); that he used most of the currency to buy new machines in 1946 and the early part of 1947 (R. 165); that in the latter part of 1947, and in 1948 and 1949, he started to build up his currency again and had three to four thousand dollars in currency at the close of 1949 (R. 165). On cross-examination the defendant admitted that he testified in a prior trial he had eight or nine thousand dollars at the starting point. (R. 193-195.)

At the conclusion of the trial the defendant was found guilty on all four counts (R. 13-14); and on November 10, 1952, a total fine of \$10,000 was imposed on counts 1 and 4 and probation for a period of three years was imposed on counts 2 and 3. (R. 14-17.) An appeal was taken to the Court of Appeals for the Ninth Circuit and on October 9, 1953,

the Court of Appeals reversed the conviction and ordered a new trial. (R. 220.) The principal ground for the decision was that the defendant's admissions as to the amount of cash which he had on hand at the starting point, i.e., December 31, 1945, could not support the conviction, in the absence of "some independent proof of the corpus delicti" (R. 219.)

REASONS FOR GRANTING THE WRIT

As this Court stated in *United States v. Johnson*, 319 U.S. 503, 517, in tax evasion cases where the defendant has engaged in multitudinous financial transactions of which he kept no adequate records, it is not to be expected that understatement of income can be shown by direct proof of the individual income-producing transactions. In such cases the customary method of proof consists in showing an increase in the defendant's net worth during the year substantially in excess of his reported income plus non-income receipts like gifts and bequests.

The use of the net worth method of proof (which has universally been sustained by the Courts of Appeals, see Brief for the United States in *Remmer v. United States*, No. 304, this Term; pp. 41-42) depends upon the establishment of a starting point, at the beginning of the tax period involved, at which all of the defendant's known assets are computed. An essential item in such computation is, of course, the amount of cash which the defendant had on hand at that time. Ordinarily, this amount rests within the private knowledge of the defendant, and any effort by the Government to prove the exact

amount involves inherent difficulty. In the present case, however, that amount was established by the defendant's own admissions—which would seem to be the best and most reliable form of proof. Nevertheless, the Court of Appeals for the Ninth Circuit held in this case that such admissions could not, in the absence of corroboration, support the conviction. The Government submits that this ruling is erroneous; that it is in conflict with decisions in other Courts of Appeals; and that, unless reviewed and reversed by this Court, the decision below constitutes a substantial obstacle to the effective enforcement of the provisions of the internal revenue laws proscribing fraudulent tax evasion.

1. The rule requiring that confessions and admissions be corroborated is a safeguard against the possibility of erroneous convictions based entirely on untrue or improbable confessions or admissions. *Warszower v. United States*, 312 U. S. 342, 347. It is held by some courts to apply also to admissions as to some essential element of the crime charged. *Forte v. United States*, 94 F. 2d 236 (C.A.D.C.). The decision below appears to be an unwarranted extension of this rule. The amount of cash on hand is not in itself either the *corpus delicti* or an essential element of the offense of willful tax evasion. A conviction could not rest on such an admission alone. Without other evidence establishing that income received was not reported, the cash item would be meaningless. Proof of an admission as to cash on hand at the beginning point, without independent corroboration, thus does not involve any

danger against which the corroboration rule is a safeguard. Cf. *Warszower v. United States*, *supra*; Wigmore, *Evidence*, (3d ed.), Vol. III, Section 821(3), Vol. VII, Section 2074.

2. The decision below is squarely in conflict with *Bell v. United States*, 185 F. 2d 302 (C.A. 4), certiorari denied, 340 U.S. 930. In that case the Court of Appeals for the Fourth Circuit noted that the amount of cash on hand at the starting point "was small, according to Bell's statement * * *." (185 F. 2d, 302, 308.) Bell had contended, *inter alia*, that "the government's case against him consists of the net worth statements and his own admissions" and "must fall on the ground that the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant." (*Supra*, p. 309.) This argument was flatly rejected. Contrary to the reasoning of the court below, the Court of Appeals for the Fourth Circuit stated (*ibid.*):

This argument assumes that the net worth statements in themselves furnish no substantial evidence whatsoever of the corpus delicti in this case; but this is not true, as we have seen. Moreover, the rule does not require that the corpus delicti be completely shown by evidence aliunde defendant's confessions, but admits the confessions where other substantial evidence of the crime is shown, and thereupon both the statements of the defendant and the independ-

ent evidence must be taken into consideration by the jury in determining whether guilt is proven beyond a reasonable doubt. * * *

In this case there is substantial evidence outside of Bell's statements to indicate his guilt. It consists of the increase in his net worth during the taxable years, the absence of personal records or books of account, and the inadequacy of the corporate records to show fully either its transactions or those of the defendant; * * *.

In the instant case, there was similar independent evidence (summarized *supra*, pp. 3-5) showing a failure to report income received.

The decision below is also inconsistent in principle with holdings in other circuits that the Government can make a *prima facie* showing of understatement of income without necessarily presenting evidence as to the exact amount of cash on hand at the starting point. *Gariopy v. United States*, 189 F. 2d 459, 463 (C.A. 6); *Schuermann v. United States*, 174 F. 2d 397 (C.A. 8), certiorari denied, 338 U.S. 831; *Leeby v. United States*, 192 F. 2d 331 (C.A. 8); *Remmer v. United States*, 205 F. 2d 277 (C.A. 9), pending on writ of certiorari, No. 304, this Term; *Holland v. United States*, decided by the Court of Appeals for the Tenth Circuit on January 21, 1954, 54-1 U.S.T.C., C.C.H. ¶ 9177. The reasoning of these cases is that the existence and amount of cash on hand are peculiarly within the knowledge of the defendant, and that his failure to present such evidence should not overcome an otherwise convincing showing of understatement of

income. These cases represent an application of the general rule stated in *Rossi v. United States*, 289 U.S. 89, 91-92, that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could readily be disproved by the production of documents or other evidence probably within the defendant's possession or control." Accord: *United States v. Fleischman*, 339 U.S. 349, 360-364; *Morrison v. California*, 291 U.S. 82, 88-91; *Casey v. United States*, 276 U.S. 413, 418; *Yee Hem v. United States*, 268 U.S. 178, 185; *Wilson v. United States*, 162 U.S. 613, 619.

CONCLUSION

The decision below is erroneous and out of harmony with rulings in other circuits. It presents a question of substantial importance in the enforcement of the penal provisions of the revenue laws. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

FEBRUARY 1954.

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

EDWARD B. CALDERON

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

ARGUED FOR THE UNITED STATES

ROBERT E. HENNINGSON,

Attorney General

W. BRUCE MULLIN,

Assistant Attorney General

WILLIAM E. FRANKLIN,

Chief of Staff

JOHN L. LEE,

Special Counsel

JOHN W. FORD,

Assistant Attorney General

Special Assistant to the Attorney General

Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	12
Argument	16
I. Since the corroboration rule at most requires independent evidence of the corpus delicti, there was no need for independent evidence of respondent's cash on hand, which was not an element of the corpus delicti	20
II. The independent evidence established the corpus delicti to the extent necessary to corroborate respondent's admission.	31
Conclusion	39
Appendix	41

CITATIONS

Cases:

<i>Barcott v. United States</i> , 169 F. 2d 929, certiorari denied, 336 U. S. 912	18, 35
<i>Bell v. United States</i> , 185 F. 2d 302, certiorari denied, 340 U. S. 930	15, 17, 25, 32, 33
<i>Brodella v. United States</i> , 184 F. 2d 823	18
<i>Bryan v. United States</i> , 175 F. 2d 223, affirmed, 338 U. S. 552	31
<i>Casey v. United States</i> , 276 U. S. 413	37
<i>Commonwealth v. Killion</i> , 194 Mass. 153	21
<i>Commonwealth v. Sanborn</i> , 116 Mass. 61	21
<i>Daeche v. United States</i> , 250 Fed. 566	13,
20, 23, 24, 25, 26, 29	
<i>Darena v. United States</i> , 198 F. 2d 230, certiorari denied, 344 U. S. 878	18, 25
<i>Dawley v. United States</i> , 186 F. 2d 978	17
<i>Ercoli v. United States</i> , 131 F. 2d 354	21

Cases—Continued

	Page
<i>Evans v. United States</i> , 122 F. 2d 461, certiorari denied, 314 U. S. 698	23, 25
<i>Ford v. United States</i> , 210 F. 2d 313	17
<i>Fortini v. United States</i> , 12 F. 2d 631	25
<i>Forte v. United States</i> , 94 F. 2d 236, affirmed, 302 U. S. 220	25, 26, 29
<i>Friedberg v. United States</i> , 207 F. 2d 777, certiorari granted, 347 U. S. 1006, No. 18, this Term	18
<i>Gariopy v. United States</i> , 189 F. 2d 459	18, 36
<i>Gendelman v. United States</i> , 191 F. 2d 993, certiorari denied, 342 U. S. 909	18
<i>Gleckman v. United States</i> , 80 F. 2d 394, certiorari denied, 297 U. S. 709	35
<i>Gordnier v. United States</i> , 261 Fed. 910	22
<i>Graves v. United States</i> , 191 F. 2d 579	18
<i>Gulotta v. United States</i> , 113 F. 2d 683	22, 25
<i>Hanson v. United States</i> , 186 F. 2d 61	18
<i>Holland v. United States</i> , 209 F. 2d 516, certiorari granted, 347 U. S. 1008, No. 37, this Term	18
<i>Hooper v. United States</i> , 213 F. 2d 30	18
<i>Jordan v. United States</i> , 60 F. 2d 4, certiorari denied, 287 U. S. 633	25
<i>Leeby v. United States</i> , 192 F. 2d 331	18
<i>Malone v. United States</i> , 94 F. 2d 281, certiorari denied, 304 U. S. 562	35
<i>Mitchell v. United States</i> , 208 F. 2d 854, certiorari denied, 347 U. S. 1012	18
<i>Morrison v. California</i> , 291 U. S. 82	37
<i>Oldstein v. United States</i> , 99 F. 2d 305	25
<i>Perovich v. United States</i> , 205 U. S. 86	27
<i>Pollock v. United States</i> , 202 F. 2d 281, certiorari denied, 345 U. S. 993	17
<i>Remmer v. United States</i> , 205 F. 2d 277, vacated and remanded 347 U. S. 227	18, 36
<i>Rossi v. United States</i> , 289 U. S. 89	37
<i>Ryan v. United States</i> , 99 F. 2d 864, certiorari denied, 306 U. S. 635	25
<i>Sasser v. United States</i> , 208 F. 2d 535	17, 36
<i>Schuermann v. United States</i> , 174 F. 2d 397, certiorari denied, 338 U. S. 831	18, 36

III

Cases—Continued

	Page
<i>Smith v. United States</i> , 210 F. 2d 496, certiorari granted, 347 U. S. 1010, No. 52, this Term	17
<i>Spies v. United States</i> , 317 U. S. 492	16
<i>Stein v. New York</i> , 346 U. S. 156	21
<i>United States v. Angel</i> , 201 F. 2d 531	23, 25
<i>United States v. Caserta</i> , 199 F. 2d 907	17
<i>United States v. Chapman</i> , 168 F. 2d 997, certiorari denied, 335 U. S. 853	18
<i>United States v. Di Orio</i> , 150 F. 2d 938, certiorari denied, 326 U. S. 771	29
<i>United States v. Fleischman</i> , 339 U. S. 349	37
<i>United States v. Hornstein</i> , 176 F. 2d 217	18
<i>United States v. Johnson</i> , 319 U. S. 503	15,
	17, 27, 34, 36, 37
<i>United States v. Kertess</i> , 139 F. 2d 923, certiorari denied, 321 U. S. 795	14, 21, 22, 26, 29
<i>United States v. Link</i> , 202 F. 2d 592	34
<i>United States v. Norris</i> , 205 F. 2d 828	17
<i>United States v. Potson</i> , 171 F. 2d 495	18, 28
<i>United States v. Vassallo</i> , 181 F. 2d 1006	17
<i>United States v. Warszower</i> , 113 F. 2d 100, affirmed, 312 U. S. 342	26
<i>United States v. Yeoman-Henderson</i> , 193 F. 2d 867	18
<i>Vogt v. United States</i> , 156 F. 2d 308	25
<i>Warszower v. United States</i> , 312 U. S. 342	20, 21, 22
<i>Wilson v. United States</i> , 162 U. S. 613	37
<i>Yee Hem v. United States</i> , 268 U. S. 178	37
Statute:	
Internal Revenue Code:	
Sec. 145 (b) (26 U. S. C. 145)	2
Miscellaneous:	
127 A. L. R.:	
1130	21
1130, 1134	23
1130, 1136	25
20 Am. Jur.:	
1086	25
1092-3	23

IV

Miscellaneous—Continued

	Page
1 Greenleaf, <i>Evidence</i> (16th ed.), § 213.....	22
9 Halsbury, <i>Laws of England</i> (2d ed.), 207, 183....	21
3 Russell, <i>Law of Crimes</i> (7th Eng., 1st Can. ed.), 2156.....	21
7 Wigmore, <i>Evidence</i> (3d ed.):	
p. 395.....	20
p. 396.....	23
p. 397.....	23, 24
§ 2070.....	21
§ 2071.....	22
§ 2072.....	30

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 25

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 218-219) is reported at 207 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1953. (R. 220.) A petition for rehearing, filed on November 22, 1953, was denied on December 8, 1953 (R. 220). On January 5, 1954, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Douglas to February 6, 1954. (R. 222.) The petition was filed on February 4, 1954, and was

granted on June 7, 1954. (R. 223.) The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in a tax evasion prosecution based on proof of unexplained increases in net worth, the defendant's admission as to the amount of cash on hand at the starting point must be corroborated by independent evidence of this fact.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

• • • • •

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

• • • • •

(26 U. S. C. Sec. 145.)

STATEMENT

On October 29, 1951, a four-count indictment was filed against respondent, a resident of Douglas, Arizona, in the United States District Court for the District of Arizona charging him with willful attempts to evade and defeat his own and his wife's income taxes for the years 1946 through 1949, by filing returns in which he fraudulently understated the amounts of their income, in violation of Section 145 (b) of the Internal Revenue Code. (R. 3-6.) The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946).....	\$3, 836. 68	\$0. 00	\$24, 855. 49	\$7, 352. 12
Count II (1947).....	3, 663. 93	9. 00	11, 056. 82	1, 450. 70
Count III (1948).....	3, 590. 73	0. 00	6, 874. 43	230. 24
Count IV (1949).....	5, 683. 80	0. 00	20, 206. 73	2, 830. 56

After a trial by jury, respondent was found guilty as charged (R. 13-14), and on November 10, 1952, he was fined a total of \$10,000 on the first and fourth counts. Imposition of sentence on the second and third counts was suspended, and respondent was placed on probation for three years. (R. 15-17.) The judgment was reversed on appeal on the ground that the Government, in undertaking to prove respondent's guilt by showing large increases in his net worth which, with non-deductible expenditures, exceeded

his reported income, had proved the item of cash on hand in the initial net-worth computation only by respondent's own admission, without other, independent evidence of this item. (R. 218-219.)

At the trial, the Government presented proof of understatements of income by showing increases in respondent's net worth plus non-deductible expenditures which far exceeded his reported income. It was stipulated that a revenue agent might testify as to the amount of respondent's assets, liabilities, and non-deductible expenditures during the years involved without producing supporting records, but an exception was made as to the amounts of cash he had on hand or in banks. (R. 8-9, 28-29, 54-55.) The amount of cash in banks was proved by the production of bank records. (R. 34-49.) Thus, the only real question as to the accuracy of the Government's computation concerned the amount of cash on hand. (R. 218.) The Government contended that respondent had only about \$500 cash on hand as of December 31, 1945. (R. 85-86.) The evidence to support this conclusion may be summarized as follows:

Prior to the Investigation.—Respondent left high school in 1926 and worked as a fry cook and dishwasher until some time in 1939. (R. 136, 153-156.) What small savings he had accumulated were used up in the depression years (R. 159), and during the period from 1933 to 1935

he worked for approximately eight dollars a week (R. 153-155).

In 1935 he made a loan of seven dollars to an acquaintance, taking as security a small penny vending machine which he placed in operation in his employer's restaurant.¹ (R. 154-155.) Thereafter, he gradually acquired a number of slot machines, pinball machines, and automatic music boxes, to the operation and care of which he finally began to devote his full time in 1939. (R. 155-157.) He had no central place of business until 1943 when he obtained space at the rear of a confectionery store in order to repair his machines. (R. 135, 159.) By that time he had over fifteen slot machines, about thirty-four music machines, and twenty or thirty pinball machines. (R. 161-162, 180.) From 1942 through 1945, the business was very good because there was an air base and a smelter in the area, but respondent was unable to buy much new equipment because of the wartime scarcity of such machines. (R. 46-47, 161-163.) He did, however, buy several thousand dollars worth of equipment; he put \$4,000 into his savings account; and he invested about \$15,000 in bonds, land and buildings. (Ex. B; R. 84-85, 195.) In 1945 he also began to operate a restaurant, the Coronado Cafe. (Exs. 10, 12, 13; R. 44-45, 184, 186.)

¹ Respondent had to borrow this seven dollars from his employer in order to make the loan. (R. 154.)

Respondent's income tax returns for 1944 and 1945 contained the following information (Exs. 12 and 13; R. 183-186):²

	Receipts from machines	Net profits from machines	Net income from all sources
1944	\$9,266.83	\$2,356.24	\$4,162.50
1945	10,302.46	4,143.94	7,328.56

His net worth as of December 31, 1945, exclusive of the amount of cash he may have had on hand, was \$25,555.06. (Ex. B, Appendix, *infra*, p. 41; R. 61-64, 195).³

In 1946 and the early part of 1947 respondent spent \$16,000 or \$17,000 for the purchase of new coin-operated machines. (R. 164-165, 181, 193.) He steadily acquired new machines during the period from 1945 through 1949, as is shown by the cost value of the machines he owned at the end of these years (R. 63-71):

² For 1941 respondent filed a nontaxable return. For 1942 he paid an income tax of \$390.92, and for 1943, \$189.87. (Ex. A; R. 81.)

³ The exhibits, not printed in the Transcript of Record, are lodged with the Clerk of the Court. Exhibit B, a statement signed under oath by respondent and introduced at the trial by him (R. 195), shows his net worth at the end of each of the years 1943 through 1949. This important and comprehensive document is printed as an Appendix to this brief, *infra*, p. 41. Some trivial adjustments in the computations shown by this exhibit, having no material bearing on the issues in the case, were made by the testimony of the Government's revenue agents at the trial. (R. 72-78, 99-104, 111-119.)

1945.....	\$8,071.00
1946.....	24,055.63
1947.....	31,945.95
1948.....	40,224.10
1949.....	45,626.44

From October 1945 through 1949, respondent made frequent deposits in his savings account in amounts ranging from \$1,000 to \$2,500. The regularity of these deposits, most of which were in currency, became more marked in the later years of this period. (Exs. 7, 8; R. 41-43.) Respondent also made frequent and regular deposits of sums ranging up to \$2,000 in his checking account. (Exs. 9, 10; R. 43-44.)

The proved increases in respondent's net worth, again without consideration of the amount of cash he may have had on hand, are shown by the following year-end totals (R. 63-74):

	Net worth	Increase
12/31/45.....	\$25,555.06	
12/31/46.....	46,812.55	\$21,257.49
12/31/47.....	54,186.42	7,373.87
12/31/48.....	57,869.09	3,682.67
12/31/49.....	72,443.95	14,574.86

In addition, respondent had non-deductible expenditures of approximately \$3,500 during each of the years involved in the indictment. (R. 64-71.)

However, despite the fact that during 1946, 1947, 1948, and 1949 he invested over \$37,000 in new machines, increased his net worth over

\$45,000, and had approximately \$14,000 in non-deductible expenditures, he reported a total net income of less than \$17,000 and reported losses from his coin machine operations in three of the years. His income tax returns for these years reported as net income from all sources the following: for 1946, \$3,836.68; for 1947, \$3,663.93; for 1948, \$3,590.73; for 1949, \$5,683.80. (Exs. 1, 2, 3, 4; R. 31-33.)

Eugene Verdugo, who kept respondent's books and made out his returns, received all his information as to receipts from respondent himself. (R. 127-129, 135.) Respondent's records were very fragmentary, and Verdugo felt that some of the receipts were not being entered in the books. (R. 137.) Eventually, he began numbering the receipt books for the coin machines after respondent told him that some of them were probably being lost before they reached Verdugo for recording. (R. 130-131.) Loss of one of these books would mean a difference of \$1,000 or \$1,500 in the annual total of receipts. (R. 132.) When preparing the 1948 return Verdugo advised respondent to get out of the vending machine business since the return indicated that he was losing money. (R. 129-130.)

The Investigation.—The investigation was initiated in 1950 with a request, complied with by respondent, that he turn over some of his invoices and records. (R. 172-173.) Thereafter, the agents began to examine his bank accounts.

(R. 114.) Ultimately they studied all such records as they could find or were made available to them by respondent (R. 52)—invoices, cancelled checks, income tax returns and Verdugo's working papers, records of various coin machine manufacturing companies, automobile records, county land transfer records and deeds (R. 65-68). The investigation went back several years beyond the period later covered by the indictment. (R. 61, 82-85.) Since it appeared to the agents that respondent's books did not record all the receipts from the coin machines (R. 89), they prepared a statement showing the annual increases in his net worth from December 31, 1943, to December 31, 1949, the results of which are partly shown in the table at p. 7, *supra*. (Ex. B; R. 61-71, 195.)

During the course of the investigation the agents had four or more conversations with respondent. (R. 90, 175.) On June 9, 1950, shortly after the investigation had begun, he appeared at the revenue office and said with some show of agitation that he believed he had lost some of his receipt books or had failed to turn them over to his bookkeeper. (R. 114, 126.) On June 18, 1950, there was a conference at which respondent, in addition to giving considerable other information about his assets and expenditures, stated that to the best of his recollection and belief he had about \$500 on hand at the end of each year, with the exception of 1949 when

he must have had \$1,971.50 since he made a deposit of that amount on January 4, 1950. (R. 56-57, 59-60, 67-68, 80-82.) The subject of cash on hand was discussed at some length. (R. 85-86.)

On August 2, 1950, the agents showed respondent and Verdugo the net-worth statement they had prepared and spent most of the day discussing and checking it with him. (R. 87-88, 106, 123-125.) The item of cash on hand was based on respondent's previous admission. (Ex. B; R. 63, 65, 68, 69, 70, 195.) He finally signed the net-worth statement. (R. 87, 195.) At the same time he signed a further statement in which he admitted that he had under-reported his income during the years from 1944 through 1949 by deliberately omitting to record some of the coin machine money in the receipt books which he turned over to Verdugo. (Ex. 11; R. 106-110.) He made a similar admission as to the omitted receipts to Verdugo during the investigation. (R. 131-132.)

The net-worth computation.—The unreported income for the years involved, as demonstrated by the agents' net-worth computation, appears from the following table (Ex. B; R. 61-71, 99-104, 195):

	Reported	Corrected	Unreported
1946-----	\$3, 836. 68	\$24, 855. 49	\$21, 018. 81
1947-----	3, 663. 93	11, 056. 82	7, 392. 89
1948-----	3, 590. 73	6, 874. 43	3, 283. 70
1949-----	5, 683. 80	20, 206. 73	14, 522. 93

Respondent had paid no income taxes in any of these years. (R. 72.) Upon his corrected income, as computed from the net-worth statement, he should have paid the following amounts (R. 99-104):

1946_____	\$7, 352. 12
1947_____	1, 450. 70
1948_____	230. 24
1949_____	2, 645. 78

Respondent's testimony.—Respondent testified that beginning in 1939 he gradually built up a reserve of cash which he kept in a safe, and that by December 31, 1945, this amounted to \$16,000 or \$17,000. (R. 164, 181-182.) He used this money to buy new coin machines in 1946 and the early part of 1947, and then began to build up his cash reserve again so that he had \$3,000 or \$4,000 by the end of 1949. (R. 164-165.)

He stated that the agents had never asked him during the course of the investigation how much money he kept in his safe or how much he carried in his pocket. (R. 176.) He admitted he had spent a day going over the items in the net-worth statement with the agents, but claimed that he did not understand what they were talking about. (R. 176-177, 187, 191.) He had relied completely upon Verdugo to keep his books and prepare his returns, and had given him full information as to all his receipts. (R. 159-161, 165-166, 177, 185.) He gave a considerably different version of the conver-

sations to which Verdugo had testified. (Compare pp. 8, 10, *supra*, with R. 166-171, 177-179, 191-192.)

On cross-examination he was vague about the exact amount of cash in his safe at the end of 1945 (R. 181-182, 197-198), and he admitted that at a previous trial he had testified that the amount was "from two—maybe eight or nine thousand dollars, I imagine." (R. 193-194.)

SUMMARY OF ARGUMENT

In holding that respondent's admission that he had \$500 in cash on hand at the starting-point could only be sufficiently corroborated by independent evidence of the same fact, the court below engrafted upon the corroboration rule an extension justified neither by precedent nor by the rule's reason. The court appears to have been led into this error by the mistaken conclusion that, without the item of cash on hand, the rest of the Government's detailed evidence, the competency and adequacy of which is not disputed, "proves nothing." Actually, this other evidence, which may well have been sufficient in itself to establish respondent's guilt, was at least ample proof of the *corpus delicti* to corroborate the admission as to cash on hand.

I

There is no dispute here over the settled rule that confessions must be corroborated. Nor is there any occasion now to oppose application of

the corroboration requirement to admissions, though the propriety of this application is at least seriously questionable. The narrower problem in this case concerns the nature of the "corroboration" required for a confession or admission.

The general rule is that a confession must be corroborated by independent evidence of the *corpus delicti*—*i. e.*, evidence that the alleged offense has been committed by someone. *Dacche v. United States*, 250 Fed. 566, 571 (C. A. 2). This evidence *aliunde* need not be sufficient in itself to establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of proof. It is enough that such evidence is presented and that it, together with the confession, satisfies the requirement of proof beyond a reasonable doubt.

It has never been suggested that the corroboration requirement should be more severe for an admission than it is for a confession. But in requiring independent evidence of the specific fact established by respondent's admission, the court below reaches precisely that result. For this specific fact—the amount of cash respondent had on hand at the starting-point—is obviously not in itself an element of the *corpus delicti* of attempted tax evasion. The elements of this *corpus delicti* are (1) a failure to report taxable income and (2) willful intent to evade tax. Cash on hand at the starting-point is relevant in prov-

ing the first of these elements in that it is an item of the defendant's net worth at the outset, with which his net worth at subsequent dates is to be compared. The important fact remains, however, that this item alone is not sufficient or uniformly necessary to prove that the offense has been committed —*i. e.*, to prove the corpus delicti. And what the court below wholly overlooked was that the Government's independent evidence, excluding cash on hand, at least tended strongly to establish the corpus delicti. See Point II, *infra*.

The corroboration rule, in denying that independent evidence must establish the corpus delicti beyond a reasonable doubt or by a preponderance of proof, plainly contemplates that a confession or admission may supply specific facts, not otherwise shown by independent evidence, to sustain the prosecution's burden. It is this which the decision below forbids, rendering an admission usable only to corroborate independent evidence. Cf. *United States v. Kertess*, 139 F. 2d 923, 929 (C. A. 2), certiorari denied, 321 U. S. 795. This result, standing the corroboration requirement on its head and substantially eliminating a most reliable means of proof, is erroneous.

II

The court below declared that, leaving out the item of cash on hand at the starting-point established by respondent's admissions, "the remainder of the [net-worth] statement proves nothing."

(R. 218.) The record and the opinion of the court itself demonstrate that this statement could not have been intended literally. Beyond question, the Government's proof was at least substantial evidence of the corpus delicti, and this is all that was required. *Bell v. United States*, 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930.

Omitting the disputed item of cash on hand, the Government proved large increases in respondent's other assets over the years in question—increases which, with non-deductible expenses, were grossly in excess of the income he had reported for those years. These discrepancies alone were substantial evidence supporting an inference that respondent had had unreported income. See *United States v. Johnson*, 319 U. S. 503, 517.

Moreover, the independent evidence made it highly improbable that the large increases in respondent's net worth, otherwise unaccounted for, could be explained by his possession of undiscovered and unrecorded cash at the starting-point on January 1, 1946. (It is, of course, this supposedly possible explanation, refuted by respondent's admission that he had only \$500 in cash on hand at the starting-point, which gives rise to the controversy in this case.) The Government showed that respondent had been penniless a decade before the starting-point; that his earnings during that decade had risen from a

meager eight dollars a week in 1935 to a modest \$7,300 for the year 1945; and that his proved net worth of over \$25,000 on December 31, 1945, was a surprisingly large amount for him to have accumulated over that period. It would have been signally reasonable to infer from this evidence alone that respondent had no such enormous cache of idle cash on hand on December 31, 1945, as could have begun to account for the considerable increases in his visible net worth over the ensuing four years.

And so respondent's admission that he had \$500 in cash on hand on December 31, 1945, accords convincingly with what the other facts proved by independent evidence would have led one to infer. Thus, the independent evidence supplies persuasive corroboration in terms of the kind of commonsense judgment juries and triers of fact generally are expected to exercise. To put the matter technically, the independent proof of the *corpus delicti* amply corroborated respondent's admission in the only sense in which corroboration is required in such circumstances.

ARGUMENT

In a taxing system which continues to rely for collection "largely upon the taxpayer's own disclosures" (*Spies v. United States*, 317 U. S. 492, 495), attempts to evade taxes are inevitably characterized by concealment and distortion. And so it frequently happens in tax evasion cases that direct proof of income-producing transactions is

impossible. See *United States v. Johnson*, 319 U. S. 503, 517. Where this has been true, the Government has customarily proved the crime, as it undertook to do in this case, by showing an increase in the defendant's net worth, plus his non-deductible living expenses, during the taxable year, substantially in excess of his reported income plus non-income receipts like gifts and bequests. This net-worth and expenditures method of proof, essentially the same as that sustained by this Court in *United States v. Johnson, supra*,⁴ has been uniformly upheld by the courts of appeals as an appropriate and necessary means of bringing tax evaders to justice.⁵

⁴In *Johnson*, the primary emphasis was upon the defendant taxpayer's expenditures, which were shown greatly to exceed his reported income. The net-worth *plus* expenditures method of the instant case includes, in addition to living expenses, a year-end financial picture showing expenditures of a capital nature reflected in increased assets, all of which must be derived either from income, from prior accumulations, or from non-income acquisitions. Whether the major emphasis is upon expenditures or upon year-end accretions to net worth, the demonstration serves in either event to point to receipts during the year which, when non-income sources are excluded, must constitute income.

⁵*Smith v. United States*, 210 F. 2d 496 (C. A. 1), certiorari granted, 347 U. S. 1010, No. 52, this Term; *United States v. Norris*, 205 F. 2d 828 (C. A. 2); *United States v. Vassallo*, 181 F. 2d 1006 (C. A. 3); *United States v. Caserta*, 199 F. 2d 907 (C. A. 3); *Bell v. United States*, 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930; *Dawley v. United States*, 186 F. 2d 978 (C. A. 4); *Poillock v. United States*, 202 F. 2d 281 (C. A. 5), certiorari denied, 345 U. S. 993; *Sasser v. United States*, 208 F. 2d 535 (C. A. 5); *Ford v. United States*,

In the present case, the item of \$500 in cash on hand at the starting-point of the net-worth computations was proved by respondent's admission to revenue agents investigating his returns. (R. 56-60.) As our Statement shows, and as the court below acknowledged (R. 218), the sufficiency of the proof of all other items in the detailed net-worth statements is beyond question. All this proof, in turn, is reinforced by respondent's confession that he had understated his income and underpaid his tax. (R. 106-110.) The court below held, however, that respondent's conviction must fall for failure of proof, reasoning (1) that without the

210 F. 2d 313 (C. A. 5); *Brodella v. United States*, 184 F. 2d 823 (C. A. 6); *Gariopy v. United States*, 189 F. 2d 459 (C. A. 6); *Friedberg v. United States*, 207 F. 2d 777 (C. A. 6), certiorari granted, 347 U. S. 1006, No. 18, this Term; *United States v. Chapman*, 168 F. 2d 997 (C. A. 7), certiorari denied, 335 U. S. 853; *United States v. Patson*, 171 F. 2d 495 (C. A. 7); *United States v. Hornstein*, 176 F. 2d 217 (C. A. 7); *United States v. Yeoman-Henderson*, 193 F. 2d 867 (C. A. 7); *Schuermann v. United States*, 174 F. 2d 397 (C. A. 8), certiorari denied, 338 U. S. 831; *Hanson v. United States*, 186 F. 2d 61 (C. A. 8); *Leeby v. United States*, 192 F. 2d 331 (C. A. 8); *Mitchell v. United States*, 208 F. 2d 854 (C. A. 8), certiorari denied, 347 U. S. 1012; *Barcott v. United States*, 169 F. 2d 929 (C. A. 9), certiorari denied, 336 U. S. 912; *Gendelman v. United States*, 191 F. 2d 993 (C. A. 9), certiorari denied, 342 U. S. 909; *Davena v. United States*, 198 F. 2d 230 (C. A. 9), certiorari denied, 344 U. S. 878; *Remmer v. United States*, 205 F. 2d 277 (C. A. 9), vacated and remanded on other grounds, 347 U. S. 227; *Graves v. United States*, 191 F. 2d 579 (C. A. 10); *Holland v. United States*, 209 F. 2d 516 (C. A. 10), certiorari granted, 347 U. S. 1008, No. 37, this Term; *Hooper v. United States*, 213 F. 2d 30 (C. A. 10).

item of cash on hand, the remainder of the net-worth statement "proves nothing"—though the items in it were "stipulated to be correct" with the exception of one item, as to which "there is no question" (R. 218), and (2) that respondent's extra-judicial admission could not serve to prove the item of cash on hand because there was no "independent proof of the corpus delicti." (R. 219.)

This reasoning, we submit, misconceives both the rule requiring that confessions and admissions be corroborated and the character of the unquestioned proof in this case. The court erred in assuming that an admission like the one involved here—relating to a specific, subsidiary fact and serving in itself neither to confess guilt nor even to establish an element of the corpus delicti—can be adequately corroborated only by independent evidence of the same specific fact. As we understand its opinion, the court held that, without independent evidence that respondent had \$500 in cash on hand at the starting-point, respondent's admission of this fact could not be used against him. We shall show that the corroboration rule, granting for present purposes its applicability to admissions (as distinguished from confessions) and accepting any of its various formulations, imposes no such restriction.

We shall argue further that a closely inter-related error of the court below is its statement that the evidence apart from respondent's admission as to cash on hand "proves nothing."

Actually, this evidence, constituting the bulk of the Government's proof, was probably sufficient in itself to make out a case for the jury. But whether this is so or not is unimportant here. What matters is that the independent evidence, so briefly dismissed by the court below, at the very least tended strongly to establish the corpus delicti. On any theory of the corroboration rule except the untenable view that the independent evidence must prove the specific fact to be shown by an admission, this evidence authorized the jury's receipt of and reliance upon respondent's admission as to cash on hand.

I

SINCE THE CORROBORATION RULE AT MOST REQUIRES
INDEPENDENT EVIDENCE OF THE CORPUS DELICTI,
THERE WAS NO NEED FOR INDEPENDENT EVIDENCE
OF RESPONDENT'S CASH ON HAND, WHICH WAS NOT
AN ELEMENT OF THE CORPUS DELICTI

1. Though it has been deprecated by eminent critics (see, *e. g.*, L. Hand, J., in *Daeche v. United States*, 250 Fed. 566, 571 (C. A. 2); 7 Wigmore, *Evidence* (3d ed.), p. 395), the rule precluding conviction based upon an uncorroborated confession alone has found widespread acceptance in the federal courts as well as in most state courts. See *Warszower v. United States*, 312 U. S. 342, 345; *Daeche v. United States*, *supra*,

at 571; 127 A. L. R. 1130.* The requirement that a confession be corroborated has been justified on the ground that it "protects the administration of the criminal law against errors in convictions based upon untrue confessions alone." *Warszower v. United States*, *supra*, at 347. Whatever merit there might be in a contrary view as an original proposition, the requirement can readily be accepted for present purposes as being firmly embedded in our law. There is no occasion to dispute it here.

An even more debatable problem is presented when the corroboration requirement is extended to *admissions*, as distinguished from confessions. For "such utterances are not usually subject to the same restrictions on admissibility as are confessions." *Stein v. New York*, 346 U. S. 156, 162-3, n. 5. See, also, *Ercoli v. United States*, 131 F. 2d 354, 356 (C. A. D. C.); *United States v. Kertess*, 139 F. 2d 923, 929 (C. A. 2), certiorari denied, 321 U. S. 795. And it is significant in the present connection that Greenleaf, credited by Wigmore as being the author of the American

*The rule has been explicitly rejected in *Massachusetts v. Sanborn*, 116 Mass. 61; *Commonwealth v. Killion*, 194 Mass. 153. It appears to apply in England only to a few crimes. See 3 Russell, *Law of Crimes* (7th Eng., 1st Can. ed.) 2156; 9 Halsbury, *Laws of England* (2d ed.) 207, 183; 7 Wigmore, *Evidence* (3d ed.) § 2070.

rule requiring corroboration of confessions (7 Wigmore, *Evidence* (3d ed.), § 2071), specifically excepted admissions from the impact of the doctrine. 1 Greenleaf, *Evidence* (16th ed.), § 213. There is, of course, no occasion on which the admission of a specific fact—particularly where, as in this case, the fact by itself is not even an element of a crime—could serve on its own hook as a basis for conviction. It is strongly arguable, therefore, that the reason for the corroboration rule applied to confessions of guilt is absent in the case of admissions. The rule as applied to admissions would seem ordinarily to be at best unnecessary, at worst a source of confusion and error, as we think it has been in the present case.

Nevertheless, the corroboration requirement has been held applicable to extra-judicial admissions which fall short of being confessions. *Gulotta v. United States*, 113 F. 2d 683 (C. A. 8); *Gordnier v. United States*, 261 Fed. 910 (C. A. 9); and see *Warszower v. United States*, 312 U. S. 342, 347; *United States v. Kertess*, 139 F. 2d 923, 929 (C. A. 2), certiorari denied, 321 U. S. 795. If in this extension by analogy, the requirement remains the same for admissions as it is for confessions, we have no need to quarrel with it here. In the decision below, however, the requirement is said to demand independent proof of the specific fact disclosed by the admission. The result is, we submit, an erroneous expansion of the cor-

roboration rule. The error lies in a misconception of the nature of the "corroboration" required to sustain a confession.

2. The broad generalization is that a confession must be corroborated by independent evidence of the corpus delicti—*i. e.*, evidence *aliunde* the confession tending to show that the alleged crime has in fact been committed by someone. See, *e. g.*, *Dacche v. United States*, 250 Fed. 566, 571 (C. A. 2); *United States v. Angel*, 201 F. 2d 531, 533 (C. A. 7); *Evans v. United States*, 122 F. 2d 461, 465 (C. A. 10), certiorari denied, 314 U. S. 698; 127 A. L. R. 1130, 1134.⁷ In a leading case explicating this generalization, Judge Learned Hand wrote (*Dacche v. United States*, *supra*, at 571):

The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed * * *. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does

⁷ Even this generalization is not unquestioned. Wigmore, generally critical of the corroboration rule, reports with approval, citing cases: "In a few jurisdictions, the rule is properly not limited to evidence concerning the 'corpus delicti'; *i. e.* the corroborating facts may be of *any sort whatever*, provided only that they tend to produce a confidence in the truth of the confession * * *." 7 Wigmore, *Evidence* (3d ed.), p. 396; and see 20 Am. Jur. 1092-3. "But in most jurisdictions the stricter form of rule is taken, and the evidence must concern the 'corpus delicti' * * *." Wigmore, *supra*, p. 397. At least in the instant case, there is no need to quarrel with "the strict~~er~~ form of rule."

this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. * * * But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof.

This formulation of the requirement, cited by Wigmore (vol. 7, p. 397, n. 4) as illustrating the "stricter" rule, has found general acceptance in the federal and state courts. As in the *Dacche* case itself, where the corroborating evidence taken alone "would not establish the conspiracy" of which the defendant had been convicted (259 Fed. at 572), a majority of the courts have held it unnecessary that such evidence alone be sufficient to prove the corpus delicti or that it touch all elements of the corpus delicti:

* * * The rule does not require that the independent evidence of corpus delicti shall be so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of the defendant's guilt beyond a reasonable doubt.

[*Jordan v. United States*, 60 F. 2d 4, 5 (C. A. 4), certiorari denied, 287 U. S. 633.]

See, also, *Forlini v. United States*, 12 F. 2d 631, 634 (C. A. 2); *Ryan v. United States*, 99 F. 2d 864, 869 (C. A. 8), certiorari denied, 306 U. S. 635; *Oldstein v. United States*, 99 F. 2d 305, 306 (C. A. 10); *United States v. Angel*, 201 F. 2d 531, 533 (C. A. 7); *Evans v. United States*, 122 F. 2d 461, 465 (C. A. 10), certiorari denied, 314 U. S. 698; *Gulotta v. United States*, 113 F. 2d 683, 685-6 (C. A. 8); *Vogt v. United States*, 156 F. 2d 308, 310-11 (C. A. 5); *Bell v. United States*, 185 F. 2d 302, 309 (C. A. 4), certiorari denied, 340 U. S. 930; *Davena v. United States*, 198 F. 2d 230, 231 (C. A. 9), certiorari denied, 344 U. S. 878; 20 Am. Jur. 1086; 127 A. L. R. 1130, 1136.

A seemingly more stringent version of the rule has been stated by the Court of Appeals for the District of Columbia Circuit. In *Forte v. United States*, 94 F. 2d 236, affirmed on other issues certified to this Court, 302 U. S. 220, that court concluded that there must be, "independent of the confession, substantial evidence of the *corpus delicti and the whole thereof*" (p. 240; emphasis added), apparently regarding this conclusion as being in accord with Judge Hand's opinion in *Daeche v. United States*, *supra*. See 94 F. 2d at 242-3. The Second Circuit, for its part, has twice indicated, in opinions in which Judge Hand joined, that its decision in *Daeche* does not go

so far as *Forte v. United States*. *United States v. Warszower*, 113 F. 2d 100, 102, affirmed, 312 U. S. 342; *United States v. Kertess*, 139 F. 2d 923, 929, certiorari denied, 321 U. S. 795.

If it mattered here, we would urge that this Court adopt the version of the overwhelming majority, as represented by *Dacche*, rather than the apparently more extreme formula laid down in *Forte*. We would argue particularly that the requirement in *Forte* of independent proof, apart from the confession, of "the whole" of the corpus delicti carries to technical excess the principle that a confession shown to be voluntary must nevertheless be sufficiently corroborated to insure its reliability. For the problem it must be remembered, is to avoid convictions based upon untrue confessions, not to pay homage to the concept of the corpus delicti. And a long legal history in most of the jurisdictions which have considered the problem makes clear that the objective may be served without rigid insistence in every case that there be evidence of every element of the corpus delicti independent of a confession.

There is, however, no need in the present case to choose between the relatively flexible majority rule as stated in *Dacche* and the narrower statement in *Forte*. It is sufficient for our purposes that *the most* any of the cases requires to corroborate a confession is independent evidence of some or all the elements of the corpus delicti. And even under *Forte* such independent evidence

need not establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of proof; it is enough that "this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith." 94 F. 2d at 240; see pp. 23-25, *supra*.^{*} We emphasize, then, that "corroboration" within the rule now at issue means no more than evidence tending in some degree to prove the corpus delicti. For it is this settled meaning of "corroboration" which the decision below misconstrues.

3. The corroboration requirement in this case arises with respect to an admission of a specific fact—respondent's cash on hand at the starting-point—rather than a confession of guilt.^{*} As we have indicated (*supra*, pp. 21-22), there is room to question whether the requirement should apply at all in the case of an admission. Passing this, however, it has certainly never been suggested that the rule should be more onerous for an admission than it is for a confession. Yet this is

^{*} Like the rest of the prosecution's case, the corpus delicti may of course be proved by circumstantial evidence. *Petrovich v. United States*, 205 U. S. 86, 91; *United States v. Johnson*, 319 U. S. 503.

^{*} It will be recalled that there were in evidence confessions of guilt by respondent as well as his admission that he had \$500 in cash at the starting-point. See p. 10, *supra*. However, it is clear from the opinion below that the only source of difficulty is the admission as to cash on hand: as to every other detail, the court found ample corroboration. See R. 218.

precisely the result accomplished by the decision below. For the court found insufficient corroboration in proof tending strongly, if not beyond a reasonable doubt, to establish the corpus delicti, and demanded in addition independent proof of the specific fact revealed by respondent's admission.

This specific fact—the amount of cash in respondent's possession at the starting-point of the net-worth computations—is obviously not in itself an element of the corpus delicti of attempted tax evasion. The corpus delicti here may be defined as consisting of (1) the omission of taxable net income from reported net income, or an understatement of net income, and (2) willful intent to evade tax. *United States v. Potson*, 171 F. 2d 495, 499 (C. A. 7). The amounts of cash in the taxpayer's hands at the beginning and end of the taxable year are, of course, relevant in proving an increase in net worth, which is in turn relevant to the ultimate fact of understatement of net income. While, as with any other offense, there may be variations in defining the corpus delicti here, there is no conceivable definition which would include as an element the amount of cash in a defendant's pocket at any given time. It is only with the addition of numerous other details (admittedly established in this case; see R. 218 and pp. 33–36, *infra*) which serve finally to prove net worth at

the beginning and end of the taxable year—plus other circumstances refuting the possibility of non-income acquisitions—that the element of understatement of income appears.

To require, as the decision below requires, independent proof of the specific fact established by the admission is to hold that admissions may almost never be used except when other evidence is sufficient to establish the defendant's guilt beyond a reasonable doubt. This amounts, in other words, to the fallacious conclusion that admissions are "admissible merely as cumulative, or as corroborative of the other evidence." *United States v. Kertess*, 139 F. 2d 923, 929 (C. A. 2), certiorari denied, 321 U. S. 795. No such paralysis is imposed by the rule requiring corroboration of confessions. There is no justification for its imposition when the rule is extended by analogy to admissions.

Where a confession is to be corroborated by independent evidence of the corpus delicti, the rule assumes in every instance that the corroboration need not extend to independent proof of the critical fact that the accused is the person who committed the offense. For proof of the corpus delicti is proof merely that the "injury against whose occurrence the law is directed" has been committed by someone; it does not include identification of the guilty party. *Daeche v. United States*, *supra*, at 571; *Forte v. United States*, *supra*, at 243-244; *United*

States v. Di Orio, 150 F. 2d 938, 939 (C. A. 3), certiorari denied, 326 U. S. 771; 7 Wigmore, *Evidence* (3d ed.), § 2072. Similarly, since under the most stringent view independent evidence need not establish the corpus delicti beyond a reasonable doubt or even by a preponderance of proof (*supra*, pp. 23-25, 26-27), the rule clearly assumes that the confession itself may supply necessary facts though such facts are not specifically corroborated.

In short, a confession may serve alone to establish a specific fact, even a fact of critical importance to the ultimate demonstration of the defendant's guilt, without independent proof of this fact, so long as there is independent proof of the corpus delicti. As to the specific fact thus established, the confession amounts, of course, to an admission. We think it plainly follows that the court below, by focussing upon the admission of a specific fact and overlooking the origin and meaning of the corroboration rule, has distorted the rule in requiring independent proof of the fact established by the admission.

Our argument does not mean, of course, that an admission of a fact could never require corroboration in the form of independent evidence of the same fact. For example, if in a tax evasion case, the Government proved defendant's bald admission that he had underreported his net income, the corroboration rule would seem to call for independ-

ent evidence of such underreporting. For this "fact", critical and ultimate in nature (and compounded of a number of subsidiary facts varying with the circumstances of each case), is, as we have noted (*supra*, p. 28), an element of the corpus delicti. We urge only that as to a subsidiary fact like the one involved here (not in itself an element of the corpus delicti), an admission is enough to establish it. Necessarily, as we show to be true in this case (*infra*, pp. 33-36), such a subsidiary fact must be coupled with others to prove the corpus delicti. And these other subsidiary facts, for the very reason that they are independent proof of the corpus delicti, corroborate the admission in the sense the rule requires.

II

THE INDEPENDENT EVIDENCE ESTABLISHED THE CORPUS DELICTI TO THE EXTENT NECESSARY TO CORROBORATE RESPONDENT'S ADMISSION

The court below took as a major premise the proposition that in the absence of "such a starting item as, say, cash on hand the remainder of the [net-worth] statement proves nothing." (R. 218.)¹⁰

¹⁰ It is interesting in this connection that the court cited *Bryan v. United States*, 175 F. 2d 223, 226 (C. A. 5), affirmed on other grounds, 338 U. S. 552 (R. 218, n. 1), in support of its observation that the prosecution must prove "each pertinent starting item of the net worth statements to a reasonable certainty." In *Bryan*, finding the conviction invalid for lack of sufficiently definite proof of defendant's net worth at the starting-point of the computations, the

A moment's reflection makes clear that the court could not have meant by this that without the item of cash on hand, the rest of the record contained no "proof" (in the sense of evidence) of anything. Indeed, on the same page of its opinion the court had acknowledged that all other items in the networth statements were established by evidence which afforded no grounds for dispute. So the court could only have meant that, excluding the cash-on-hand item, the Government had not *completely* proved its case—*i. e.*, had not adduced sufficient evidence to warrant the jury's finding of guilt beyond a reasonable doubt. Even this conclusion, we believe, would be open to serious doubt if it were necessary to question it here. But, here again, the significant point is the court's misconception of the amount and character of evidence required to corroborate respondent's admission. When this requirement is correctly understood, it becomes plain that the independent evidence provided ample corroboration, that respondent's admission was therefore properly submitted to the jury, and that the evidence as a whole decisively justified the judgment of conviction. Cf. *Bell v.*

court twice indicated that this deficiency could have been supplied had there been admissions by the defendant. Pp. 225 and 227. Here, where defendant's admissions fastened securely the last link that could possibly be required for the Government's detailed chain of proof, we are told that the admissions may not be used.

United States, 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930.¹¹

As we have shown in Point I, the evidence corroborating a confession or admission must tend to prove the corpus delicti, but need not establish it beyond a reasonable doubt or even by a preponderance of proof. It is readily demonstrable that the independent evidence in this case at least met the test.

Leaving aside the disputed item of cash on hand (the amount of which was shown as constant, except in the last year, during the period covered by the computations), there was uncontroverted evidence of substantial increases in respondent's other assets—cash in banks, savings bonds, merchandise inventory, furniture and fixtures, coin machines, automobiles, land and buildings. In addition, there was undisputed testimony showing expenditures by respondent which were neither reflected in visible assets nor deductible for income-tax purposes. The foregoing figures revealed net-worth increases plus non-deductible expenditures aggregating \$24,855.49 in 1946, \$11,056.82 in 1947, \$6,874.43 in 1948, and \$20,206.73 in 1949.¹² See Ex. B, *infra*,

¹¹ As noted in our petition for a writ of certiorari (pp. 8-9), the decision below is in conflict with the Fourth Circuit's decision in the *Bell* case.

¹² Minor inaccuracies in those figures, to which we have referred above (footnote 3, p. 6), were explained during the testimony of the revenue agents and are clearly too insignificant to affect the issues.

p. 41. In striking contrast with these figures, respondent's tax returns reported net income of \$3,836.68 for 1946, \$3,663.93 for 1947, \$3,590.73 for 1948, and \$5,683.80 for 1949. These discrepancies—while we have no need to claim that they could by themselves have warranted conviction—supplied substantial evidence from which the jury could infer that respondent had had unreported income. See *United States v. Johnson*, 319 U. S. 503, 517; *United States v. Link*, 202 F. 2d 592, 593 (C. A. 3).

The item of cash on hand at the starting-point is useful and important, of course, to negate the possibility that the unexplained increases in net worth and expenditures during the prosecution years may be accounted for by an undiscovered prior accumulation. But, again excluding respondent's admissions that no such explanation was available to him, there was considerable evidence tending to establish this point. The Government carefully proved that respondent had been a man of markedly limited means over a considerable period preceding the years which were important in this case. He had worked as a fry cook and a dishwasher until 1939, earning approximately eight dollars a week from 1933 to 1935. His small savings were consumed by the depression. His tax returns for the years 1941 to 1945 (the first year covered by the indictment was 1946) revealed a modest income,

even for the period 1942-1945 which he described as his "best years" (R. 161). In the last of these years, his income reached a high of \$7,328.56. *Supra*, pp. 4-6.

Having proved these historical details, the Government's proof then showed, still excluding cash on hand, that respondent's net worth on December 31, 1945, was \$25,555.06. *Supra*, p. 7. This figure, given respondent's pennilessness a decade earlier and his record of relatively meager earnings in the years between, is remarkably high. A jury would certainly have been justified in inferring that, however severely frugal he had been, respondent had not accumulated any considerable amount of additional assets in the form of undiscovered cash on hand. The inference would have been fortified by the fact that in 1940 and 1942 respondent had made withdrawals from his interest-bearing savings account (Ex. 7; R. 41), a step hardly consistent with the possession of a great hoard of idle cash. See *Barcott v. United States*, 169 F. 2d 929, 932 (C. A. 9), certiorari denied, 336 U. S. 912.¹³ It was

¹³ Still further support for the inference was supplied by the fact that respondent made frequent and fairly regular bank deposits during the period from October 1945 through 1949. *Supra*, p. 7. It has been noted that such activity is some indication that the funds deposited, increasing visible net worth, derive from current income rather than from a prior accumulation of cash held in idle storage. See *Gleckman v. United States*, 80 F. 2d 394, 399 (C. A. 8), certiorari denied, 297 U. S. 709; *Malone v. United States*, 94 F. 2d 281, 287 (C. A. 7), certiorari denied, 304 U. S. 562.

plainly reasonable, we submit, even without respondent's clinching admissions, to conclude that the total of more than \$45,000 in respondent's increased net worth and non-deductible expenditures for the period 1946-1949, over and above reported income, represented unreported income rather than a bundle of cash he had on hand at the outset of the period.

Of course, in practically every case of this kind, the sizeable cache of hidden treasure suddenly disclosed during the prosecution years is an obvious explanation to be attempted by the defendant. The courts of appeals, including the court below, have repeatedly made it clear that where convincing evidence belies such a possibility, "argumentative speculations" that it may nevertheless exist will not serve to overthrow a jury's conviction to the contrary. *Gariepy v. United States*, 189 F. 2d 459, 462 (C. A. 6); *Remmer v. United States*, 205 F. 2d 277, 287 (C. A. 9), vacated and remanded on other grounds, 347 U. S. 227; *Schuermann v. United States*, 174 F. 2d 397, 399 (C. A. 8), certiorari denied, 338 U. S. 831; *Sasser v. United States*, 208 F. 2d 535, 538-539 (C. A. 5). To hold otherwise "would be tantamount to holding that skilful concealment is an invincible barrier to proof." *United States v. Johnson*, 319 U. S. 503, 518. It would ignore, moreover, the "general principle * * * that it is not incumbent on the

prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." *Rossi v. United States*, 289 U. S. 89, 91-92; *United States v. Fleischman*, 339 U. S. 349, 360-361; *Morrison v. California*, 291 U. S. 82, 88-91; *Casey v. United States*, 276 U. S. 413, 418; *Yee Hem v. United States*, 268 U. S. 178, 185; *Wilson v. United States*, 162 U. S. 613, 619.

We re-emphasize, finally, that the independent proof summarized in the preceding paragraphs was not required to be sufficient in itself to refute the possibility that the increases in respondent's net worth were explainable as representing only a towering pile of cash he had on hand at the beginning of 1946. If there were such a necessity, we think it would be met.¹⁴ But the Government introduced respondent's own admission that he had only \$500 in cash on hand at the critical time, and the sole problem is whether this was sufficiently corroborated to be usable. On this crucial point, forgetting for a moment our technical concern with the corpus delicti and referring simply to the kind of commonsense judgment which might after all serve

¹⁴ It would be pertinent in this connection that the Government is not required to prove the exact amount of unreported income. *United States v. Johnson*, 319 U. S. 503, 517.

best in every case of this kind, it is apparent that respondent's admission tellingly confirmed the fact as it would probably have been inferred to be anyhow. The fact that respondent had, in addition to his more than \$25,000 in other assets at the end of 1945, only this relatively small amount of cash on hand accorded precisely with all the other circumstances. The admission served, in short, merely to lay finally to rest an exculpatory suggestion which the other facts in evidence had already shown to be highly incredible.

If, as we think has been demonstrated, respondent's admission as to cash on hand was amply corroborated in the only sense the law requires, the single basis for the reversal of his conviction by the court below disappears. And there is no other ground for the reversal. The sufficiency of the evidence as a whole—which, except for the corroboration of cash on hand, was not questioned by the court below—is clear beyond question. Indeed, it includes respondent's confessions of guilt (*supra*, p. 10), the validity of which is plain once the single difficulty as to cash on hand is erased. These, together with the other evidence we have summarized, leave no doubt that the jury and the trial court were right in finding respondent guilty.¹⁵

¹⁵ We should note, finally, that respondent's testimony at the trial as to his cash on hand at the starting-point, though it contradicted both his admissions and his testimony at an earlier trial, would itself suffice to support the verdict and

CONCLUSION

It is respectfully submitted that the judgment of the court below, reversing respondent's conviction, should be reversed.

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Special Assistants to the Attorney General.

AUGUST 1954.

the sentence. He stated at the trial that he had had \$16,000 or \$17,000 on hand on December 31, 1945, and that he spent this for new machines in 1946 and the early part of 1947. (R. 164-165, 181-182, 193-194.) Since the amount of unreported income shown by the Government's proof was over \$21,000 for 1946 and \$7,000 for 1947 (*supra*, p. 10), the most respondent's own testimony could have shown, taking it in its aspect most favorable to the defense, was that he had not evaded taxes for 1947. The Court of Appeals erred in concluding (R. 219) that the jury would also have had to acquit for the year 1948 had they believed this testimony. For part of this testimony was that this supply of cash had been spent by early 1947. Moreover, even believing this whole unlikely story of cash on hand, the jury could well have found respondent guilty for all four years. Since he claimed the money was spent in 1946 and the early part of 1947, it could readily have been inferred that the amount spent in 1947 was insufficient to account for the more than \$7,000 in unreported income shown for the latter year by the Government's computations. Consequently, on respondent's

own testimony, which of course presents no problem of corroboration, there was sufficient evidence to take all four courts to the jury.

The fact remains that the Court of Appeals was probably correct in concluding (R. 219) that the jury disbelieved respondent's testimony altogether. The jury was right; the testimony was incredible. What made it incredible returns us to our main argument; respondent's earlier admissions, corroborated by and fitting convincingly with the independent evidence, refuted beyond doubt the assertion that he had had on December 31, 1945, any considerable sum in cash on hand.

APPENDIX

RESPONDENT'S EXHIBIT B

EDWARD B. AND RAFAELA CALDERON

Item No.		NET WORTH							Remarks
		December 31, 1943	December 31, 1944	December 31, 1945	December 31, 1946	December 31, 1947	December 31, 1948	December 31, 1949	
ASSETS									
(A)	Cash on Hand	\$500.00	\$500.00	\$500.00	\$500.00	\$500.00	\$500.00	\$1,971.50	Mr. & Mrs. E. B. Calderon, Checking Acct. Coronado Cafe, Checking Acct. Edw. B. & Rafaela Calderon, Savings Acct. Edw. B. & Rafaela Calderon, Savings Acct. Series E and Stat cost. (Cost).
(B)	Cash in Banks:								
	Bank of Douglas "Checking"	989.91	1,494.33	988.91	1,879.09	1,713.78	388.36	891.59	
	Bank of Douglas "Checking"	0	0	96.96	847.52	270.07	162.32	13.60	
	Bank of Douglas "Savings"	3,039.87	3,070.33	4,102.77	6,970.44	4,086.51	6,037.07	18,034.24	
	Valley National Bank, "Savings"	0	0	0	0	0	762.08	1,776.92	
(C)	Bonds, U. S. Treasury	1,975.00	5,181.25	5,181.25	5,181.25	5,181.25	5,181.25	6,181.25	
(D)	Merchandise Inventory	38.25	75.00	1,075.60	1,847.91	3,820.08	3,090.50	4,331.96	
(E)	Furniture & Fixtures	0	0	944.00	1,394.06	2,175.09	2,148.45	2,148.45	
(F)	Equipment Machines	4,493.48	6,888.51	8,071.00	24,055.63	31,945.95	40,224.10	45,026.44	
(G)	Automobiles	1,855.00	1,855.00	1,855.00	1,855.00	1,855.00	1,855.00	2,519.21	
(H)	Land	1,400.00	1,400.00	2,300.00	2,600.00	3,100.00	3,100.00	3,300.00	
(I)	Buildings	5,800.00	5,800.00	8,140.00	10,943.49	18,643.49	18,643.49	19,143.49	
Total assets		20,061.51	26,264.42	32,956.49	58,075.34	* 73,291.22	82,092.62	105,938.65	
LIABILITIES									
(J)	Accounts Payable	0	0	0	1,027.44	2,882.46	1,625.02	300.00	
(K)	Reserve:								
	Depreciation:								
	Furniture & Fixtures	0	0	108.07	229.97	463.96	727.78	995.23	
	Equipment Machines	2,153.83	3,531.54	5,145.72	7,364.12	12,274.92	18,802.33	25,060.46	
	Automobiles	280.10	355.60	431.10	506.60	581.10	656.00	94.61	
	Buildings	650.00	894.00	1,221.54	1,624.66	2,254.08	3,011.82	3,772.90	
Total liabilities		3,083.95	4,781.14	6,906.43	10,762.79	18,456.56	24,823.53	30,823.20	
Net Worth		16,977.56	21,483.28	26,050.06	47,312.55	* 54,834.66	58,369.09	75,115.45	
Increase Net Worth			4,505.72	4,566.78	21,262.49	* 7,522.11	* 3,534.43	16,746.36	
(L)	Living Expense		3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	
Total			7,505.72	7,565.68	24,262.49	* 10,522.11	* 6,534.43	19,746.36	
Plus:									
(M)	Insurance Premium Paid						200.00	172.69	
(N)	Automobile Purchased for Father			200.00					
(O)	Expended for Vacations				400.00	543.71			
(P)	Expenses, Doctors & Hospitals		167.12	106.50	7.00	91.00	40.00	275.00	
(Q)	State of Arizona, Income Tax Paid		3.00	31.78	0	0	0	12.68	
(R)	Federal Income Tax Paid		861.36	164.64	186.00	0	0	0	
Net taxable income			8,537.26	8,069.00	24,856.49	* 11,156.82	* 6,774.42	20,206.73	

The figures shown above are the same as those originally shown in a typewritten copy admitted as Defendant's Exhibit B. In this and each instance hereafter mentioned, the figures shown were

* Adjusted to \$7,422.11

* Adjusted to \$3,654.43

(F)	Equipment Machines.....	4,493.48	6,888.51	8,071.00	24,055.63	31,945.95	40,224.10	45,626.44
(G)	Automobiles.....	1,855.00	1,855.00	1,855.00	1,855.00	1,855.00	1,855.00	2,519.21
(H)	Land.....	1,400.00	1,400.00	2,300.00	2,600.00	3,100.00	3,100.00	3,300.00
(I)	Buildings.....	5,801.00	5,820.00	8,140.00	10,943.49	18,643.49	18,643.49	19,143.49
	Total assets.....	20,061.51	26,264.42	32,956.49	38,075.34	* 73,291.22	82,692.62	105,938.65
	LIABILITIES							
(J)	Accounts Payable.....	0	0	0	1,027.44	2,882.46	1,625.02	300.00
(K)	Reserve:							
	Depreciation.....	0	0	108.07	239.97	463.96	727.76	993.23
	Furniture & Fixtures.....	0	0	108.07	239.97	463.96	727.76	993.23
	Equipment Machines.....	2,153.85	3,531.54	5,145.72	7,364.12	12,274.96	18,302.33	25,660.46
	Automobiles.....	280.10	325.60	431.10	506.60	581.10	656.60	94.61
	Buildings.....	650.00	894.00	1,221.54	1,624.66	2,254.08	3,011.82	3,772.90
	Total liabilities.....	3,083.95	4,781.14	6,906.43	10,762.79	18,456.56	24,323.53	30,823.20
	Net Worth.....	16,977.56	21,483.28	26,050.06	47,312.55	* 54,834.66	58,369.09	75,115.45
	Increase Net Worth.....		4,505.72	4,566.78	21,262.49	* 7,522.11	* 3,534.43	16,746.36
(L)	Living Expense.....		3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00
	Total.....		7,505.72	7,566.68	24,262.49	* 10,522.11	* 6,534.43	19,746.36
	Plus:							
(M)	Insurance Premium Paid.....						200.00	172.69
(N)	Automobile Purchased for Father.....			200.00				
(O)	Expended for Vacations.....				400.00	543.71		
(P)	Expenses, Doctors & Hospitals.....		167.12	106.50	7.00	91.00	40.00	275.00
(Q)	State of Arizona, Income Tax Paid.....		3.06	31.78	0	0	0	12.68
(R)	Federal Income Tax Paid.....		861.36	164.64	186.00	0	0	0
	Net taxable income.....		8,537.26	8,069.60	24,855.49	* 11,156.82	* 6,774.43	20,206.73

¹ The figures shown above are the same as those originally shown in a typewritten copy admitted as defendant's Exhibit B. In this and each instance hereafter mentioned, the figures shown were corrected in ink and the initials E. C. placed next to the adjustment in the left margin. In this particular instance the figure shown was adjusted to \$2,075.09.

² Adjusted to \$73,191.22.

³ Adjusted to \$54,734.66.

⁴ Adjusted to \$7,422.11.

⁵ Adjusted to \$3,634.43.

⁶ Adjusted to \$10,422.11.

⁷ Adjusted to \$6,534.43.

⁸ Adjusted to \$11,056.25.

⁹ Adjusted to \$6,874.43.

I, Edward Calderon, after being duly sworn upon oath, and after having been advised of my constitutional rights, depose and say that I have read the above schedule and that it discloses my true net worth on the dates indicated, together with my living expenses for each of the above-stated years.

(S) Edward B. Calderon
EDWARD B. CALDERON.

Subscribed and sworn to before me this 2nd day of August, 1950, at Douglas, Arizona.

(S) LLOYD M. TUCKER,
Special Agent.

Witness:

(S) R. E. WEBB,
Deputy Collector.

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

**WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

SIMON E. ROBELOFF,

Solicitor General,

H. BRIAN HOLLAND,

Assistant Attorney General,

MARVIN E. FRANKEL,

ELLIS W. SLACK,

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INDEX

	Page
I. The respondent's characterization of this as a "bare net worth case" is erroneous. Since respondent voluntarily admitted that he had unreported taxable income in large amounts, the crucial inquiry concerns the corroboration of his admissions. . . .	1
II. Respondent's general discussion of the difficulties of net worth proof and asserted conditions precedent for its use is irrelevant to this case.	8
III. There was sufficient evidence of wilfulness.	11
IV. Respondent is not entitled to seek a judgment of acquittal here	14

CITATIONS

Cases:

<i>Adolfson v. United States</i> , 159 F. 2d 883, certiorari denied, 331 U.S. 818	7
<i>Barrow v. United States</i> , 171 F. 2d 285.	12
<i>Blumenthal v. United States</i> , 185 F. 2d 883, affirmed, 332 U.S. 539.	7
<i>Bryan v. United States</i> , 338 U.S. 552	14
<i>Daeché v. United States</i> , 250 Fed. 566	7-8
<i>Gleckman v. United States</i> , 80 F. 2d 394, certiorari denied, 297 U.S. 709	11
<i>Hall v. United States</i> , 168 F. 2d 161, certiorari denied, 334 U.S. 853.	7
<i>Holland v. United States</i> , No. 37 this Term	8
<i>Ladrey v. United States</i> , 155 F. 2d 417	7
<i>Le Tulle v. Scofield</i> , 308 U.S. 415	14
<i>Leyer v. United States</i> , 183 Fed. 102	7
<i>Lisansky v. United States</i> , 31 F. 2d 846, certiorari denied, 279 U.S. 873	11
<i>Lü v. United States</i> , 198 F. 2d 109.	7
<i>Matz v. United States</i> , 158 F. 2d 190	7
<i>Morley Co. v. Maryland Casualty Co.</i> , 300 U.S. 185	14
<i>Paschen v. United States</i> , 70 F. 2d 491	11

Cases—Continued

	Page
<i>Rutkin v. United States</i> , 343 U.S. 130	5, 13
<i>Spies v. United States</i> , 317 U.S. 492	12, 13
<i>Stinnett v. United States</i> , 173 F. 2d 129	11
<i>United States v. Goldstein</i> , 168 F. 2d 666	7
<i>United States v. Murdock</i> , 290 U.S. 389	13

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 25

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

I

The Respondent's Characterization of this as a "Bare Net Worth Case" Is Erroneous. Since Respondent Voluntarily Admitted That He Had Unreported Taxable Income in Large Amounts, the Crucial Inquiry Concerns the Corroboration of His Admissions

1. Respondent's brief repeatedly describes this as a "bare net worth case," and states that "the only evidence of additional income offered by the Government was the alleged increase in net worth." (Br. 10, 16, 37, 63.) Building upon these clearly

erroneous statements of fact, respondent devotes considerable space (*e.g.*, pp. 23-35) to discussions in the abstract of "bare" net worth proof and of the asserted "assumption" by the Government (an assumption the Government wholly disclaims) that mere increases in net worth (visible or invisible) are sufficient to establish an attempt to evade taxes. The discussion, while its details would warrant dispute at various points even on its own level of abstraction, is beside the point. It is necessary to reemphasize the central fact in this case (necessarily acknowledged at various points in respondent's brief—*e.g.*, pp. 6, 51) that *respondent admitted he had unreported income* (R. 108-109, 219). The Government sought certiorari to have determined whether respondent's admissions, the voluntariness of which is unquestioned, could be used as part of the proof of the offense of attempted tax evasion.

2. As we have read its opinion, the Court of Appeals was concerned wholly, or at least primarily, with respondent's admissions that he had \$500 in cash on hand at the beginning of 1946, the starting point of the Government's net worth computations. Reconsidered in the light of respondent's arguments, that reading still seems essentially correct.¹ Respondent argues, however, (a) that

¹ Pointing out that there was no question as to any other item in the net worth computation the Government established, the court below stated at the outset that the item of "cash on hand" at the starting point was the crucial and disputed one, without which "the remainder of the statement

there were in fact no such admissions (Br. 16-19), and (b) that the corroboration requirement must be considered anyhow in the light of the broad admission of unreported income rather than the admission only as to cash on hand (Br. 51). The first of these assertions is refuted by the record. As to the second, the broader admission is undoubtedly in the case; the sufficient reason against our having sought review initially in terms of this admission was that the decision below turned on whether the narrower admission, showing cash on hand at the starting point, had to be corroborated by independent evidence of this specific item.

a As the court below obviously agreed (R. 218, 219), there was convincing evidence that respondent

proves nothing." (R. 218.) Stating the claim of respondent (appellant below), the court said he "contends there is no admissible evidence to show his charged understatements, since all the testimony concerning the cash on hand consisted of his extrajudicial admissions to the tax officials and to his tax consultant." (R. 219.) And this fairly stated respondent's argument, since he carefully emphasized below (Appellant's Br. 6) that the Government's asserted failure to prove by evidence independent of his admissions the item of cash on hand at the starting point resulted in the "basic error" of the District Court, "which [gave] rise or [established] a foundation for the remaining errors." It was this contention, we think, that the court sustained. Accordingly, our argument in the main brief was directed to (1) the court's major premise that, without the item of cash on hand, the undisputed evidence establishing the rest of the net worth computations "proves nothing", and (2) the evident conclusion from this that cash on hand had to be established by independent evidence of this specific fact before the corroboration required for respondent's admissions could be said to have been supplied.

ent had orally admitted having \$500 in cash on hand at the end of 1945 (the starting point), and the record contains, in any event, the same admission in respondent's written statement signed under oath (see the Government's main brief, Appendix, p. 41). Special Agent Tucker testified that respondent had orally stated this fact to him (R. 59). On cross-examination, defense counsel elicited from Tucker that, in discussing the cash-on-hand item with respondent, and in his notes on the interview, Tucker had referred to "cash in his pocket" (R. 82, 85), and the argument here (Resp. Br. 17, 18) is that respondent's statement omitted cash in his safe. The testimony as a whole makes clear, however, that the agent's inquiries were directed to respondent's undeposited cash on hand (physically in a pocket or elsewhere), that this matter was discussed at length with respondent (R. 85), and that it was incorporated in the written net worth statement which was signed by respondent after the agents had reviewed each item with him for most of an entire day (R. 87, 123-124, 188, 191).²

² In addition, in his written statement admitting unreported income, respondent said that it was his practice through the years in question to make regular deposits in his checking account sufficient to pay current expenses, and that he accumulated excess receipts only for short periods before depositing them in his savings account (R. 108). This was a further admission that it was not his practice to accumulate a large amount of cash on hand.

Respondent's vigorous insistence that it was improbable he had "exactly" \$500 in cash on hand at the starting point (Br. 18) and that "not one cent of funds on hand December 31, 1945" was used to buy new machines the following year

From this evidence it is clear why the court below had no doubt respondent had made the admission around which the case has so far revolved. It is equally clear that the jury, resolving any supposed problems of credibility or uncertainty in the testimony, was entitled to find there had been such an admission. Cf. *Rutkin v. United States*, 343 U.S. 130, 135.

b. As to respondent's broader admission that he had failed to report taxable income (B. 108-109), we have accepted, for purposes of this case, the requirement that such an admission be supported by independent evidence. The question throughout has been whether, insofar as the independent proof took the form of a showing of net worth increases, it tended to establish the *corpus delicti*. And this question in turn has centered on whether the undisputed showing of large increases in respondent's other assets—business equipment, land, buildings, etc.—was meaningless apart from his admission that he had only \$500 in cash on hand at the starting point.

Accordingly, our argument has been (1) that there was no need for independent evidence, apart

(Br. 54), is wide of the mark. Of course, these figures are not intended to be accurate to the last cent. The problem as to starting point is simply to prove convincingly that no amount of assets has been overlooked sufficient to account for any substantial part of the net worth increases shown for the ensuing period. Moreover, the same kind of immaterial understatement could have occurred for dates subsequent to the starting point when respondent was similarly credited with "exactly" \$500 in cash on hand.

from respondent's admissions, as to this specific item of cash on hand, and (2) that if such evidence was necessary, it was supplied in this case. Contrary to respondent (Br. 40-41), we urge as a factual proposition that marked increases in a person's visible, discoverable assets are evidence supporting an inference that the person is in receipt of current taxable income. Of course, the inference may not be so strong from such evidence alone as to be established beyond a reasonable doubt. But that is not the issue here. The issue is whether the evidence has any substantial probative force at all; because, if it has, there is corroboration for the admission (or admissions), and it is this problem of corroboration which is disputed.

The true issue, in other words, is not whether respondent's conviction could have been sustained without his admissions. Nobody has ever denied the importance of the admissions; it is not denied here. The question in simplest terms is only whether the independent evidence that respondent's wealth in various forms increased during the prosecution years sufficiently corroborated his admissions. Our point has been that there was, independent of the admissions, evidence of unreported income in the detailed net worth computations which, except for the item of cash on hand, was established beyond dispute. We have sought to show, moreover, that there was evidence of respondent's prior history to confirm his specific admission that his acquisitions during the years in issue did not come from a store of currency held

in his safe at the outset of this period.³ And we contend that the independent evidence amply corroborated respondent's admissions.

Appearing to accept the majority rule of *Dacche*

³In this connection, respondent observes (Br. 56) that much of the evidence of his background and financial circumstances was supplied by his own testimony, and he appears to suggest that the sufficiency of the corroboration should be determined without reference to the testimony he gave in his own defense or on cross-examination (Br. 57). It is clear, however, that though respondent moved for acquittal at the close of the Government's case, the sufficiency of the evidence, including the sufficiency of the corroboration of his admissions, is to be judged here by all the evidence, including that developed in the course of the testimony produced for the defense. *United States v. Goldstein*, 168 F. 2d 666, 669-670 (C.A. 2); *Leyer v. United States*, 183 Fed. 102 (C.A. 2); *Hall v. United States*, 168 F. 2d 161, 164 (C.A. D.C.), certiorari den., 4, 334 U.S. 853; *Ladrey v. United States*, 155 F. 2d 417, 420 (C.A. D.C.); *Lü v. United States*, 198 F. 2d 109, 112 (C.A. 9).

Nor does it matter that the corroboration, both in the Government's evidence and in defendant's testimony, may have been supplied after evidence of respondent's admissions had been introduced (cf. Resp. Br. 56). "The order in which evidence to prove the corpus delicti is to be received is not important and is largely a matter within the discretion of the trial court. If proof in the nature of independent corroborative evidence supports the introduction of a confession, the time of its introduction is not important. It is sufficient if it is forthcoming at some point in the trial. All of the evidence in this case on which the Government relied was properly connected before the Government closed its case." *Adolfson v. United States*, 159 F. 2d 883, 888 (C.A. 9), certiorari denied, 331 U.S. 818. See also *Matz v. United States*, 158 F. 2d 190, 192 (C.A. D.C.); *Blumenthal v. United States*, 158 F. 2d 883, 889 (C.A. 9), affirmed, 332 U.S. 539. It is peculiarly appropriate in a case of alleged tax evasion, where the events as they actually unfold begin with returns and explanations by the taxpayer, that the facts narrated at the trial should include an early account of the defendant's declarations regarding the matters in issue.

v. *United States*, 250 Fed. 566 (C.A. 2), and urging it as the rule followed by the court below (Br. 48-51), respondent apparently agrees that independent evidence of the element of unreported income would constitute sufficient corroboration. What he denies is that there was any such proof at all.⁴ On the issue thus joined, we rely on our main brief, having been primarily concerned in this reply with keeping this issue in focus.⁵

II

Respondent's General Discussion of the Difficulties of Net Worth Proof and Asserted Conditions Precedent for Its Use Is Irrelevant to this Case

As we have noted, much of the general theoretical discussion in respondent's brief overlooks the vital point in this case that he admitted unreported income. For the sake of clarity, we pinpoint three of the matters so discussed only to dispel the suggestion that they have any bearing here.

1. In the Government's brief in *Holland v. United States*, No. 37 (pp. 32-40), we have sought to demonstrate the fallacy of the contention that

⁴ Interesting in this connection is the contrast between (1) respondent's agreement, discussing *Dacche* (Br. 51), that evidence of communication with alleged co-conspirators and of efforts to obtain explosives "clearly established one element of the offense—attempting to destroy a vessel—" and (2) his insistence that proof of large acquisitions of business and other properties is no evidence whatsoever tending to show income.

⁵ On the sufficiency of the proof of wilfulness, see Point III, *infra*.

the net worth method of proof may not be employed at all unless the defendant's books have been shown to be inaccurate or his "method of accounting" has been proved inadequate. That demonstration would apply here if respondent's presentation of the same fallacy (Br. 27-30) had any place in this case. But apart from the fact that he posed no such issue below (see Resp. Br. 29, fn. 8), respondent's discussion is rendered pointless by (1) his own admission of unreported income and (2) the established fact that his books and records were inadequate and incomplete (R. 89). This latter fact has not merely been undisputed; it has heretofore been a matter upon which respondent himself insisted, declaring, for example, in his brief before the court below (p. 3) that his "books and records were incomplete and so poorly kept that the consequent tax returns were also undoubtedly faulty * * *."

2. Similarly misconceived are the suggestions that proof of unreported income by the net worth method alone should be confined to "lucrative illicit enterprises which kept no books or records" (Resp. Br. 23-24), and that such circumstantial evidence can serve only to "reinforce" direct proof of unreported income (*id.*, 44-45). We do not stop to quarrel with such generalizations here except to note the futility of *a priori* abstractions for deciding concrete cases and to express our disagreement with the notion that the character of the defendant must inevitably determine the kind of evidence which may be probative of his guilt. It is

sufficient for present purposes that the evidence on which the jury convicted respondent meets his own theoretical test. He admitted unreported income; the proof of his net worth increases served precisely as reinforcement. It is, after all, in this most telling sense that we have urged that the necessary corroboration was supplied. The jury could certainly have found reliable the admission of unreported income when it was accompanied by proof that petitioner's tangible wealth increased at a rate wholly out of keeping with the tax-free returns he had filed.

3. Respondent points out (*Ex.* 34-35) that in a "bare" net worth case the proof must show, not merely that the defendant got wealthier, but that the wealth stemmed from unreported income. There is no quarrel with this generalization. Then, however, as if this were pertinent here, respondent points out that increased wealth may come "from non-taxable sources, such as gifts, inheritances, insurance proceeds, soldier's bonus, etc." Here, again, it must be repeated that petitioner had admitted the source of his net worth increases to be unreported income, and had expressly denied receiving during the years in issue any gifts, inheritances, or insurance proceeds (*R.* 108). Moreover, at the trial, though repudiating the admission, he sought to establish none of the possible explanations his brief now lists. Testifying on his own behalf, he attempted as his exclusive explanation—exclusive of the conceivable answers other people might have to a charge of attempted tax evasion—to show that

his apparent net worth increases during the indictment years represented only purchases made from a store of cash held in his safe at the starting point.

III

There Was Sufficient Evidence of Wilfulness

Respondent's argument on this issue (Br. 61 *et seq.*) is that there was no evidence in the whole record, including his admissions, from which the jury could have been permitted to infer, as it did, that his attempt to evade taxes was wilful. He does not appear to insist that the independent evidence alone was required to prove this element of the offense. Cf. pp. 7-8, *supra*. It is clear, in any event, that even apart from the admissions, there was evidence of wilfulness, and that when the record is considered as a whole, including respondent's admissions, the proof on this issue amply warranted submission to the jury.

1. The visible net worth increases alone were some evidence of substantial amounts of unreported income for four successive years (R. 99, 102, 104). This proof, particularly when considered with the independent proof that respondent paid no taxes whatsoever during this four-year period, was at least some evidence on the issue of wilfulness. Cf. *Stinnett v. United States*, 173 F. 2d 129 (C.A. 4); *Paschen v. United States*, 70 F. 2d 491, 498-9 (C.A. 7); *Lisansky v. United States*, 31 F. 2d 846, 851 (C.A. 4), certiorari denied, 279 U. S. 873; *Gleckman v. United States*, 80 F. 2d 394, 401 (C.A. 8), certiorari denied, 297 U.S. 709.

In addition, the independent evidence showed that receipt books which were essential to the maintenance of books to reflect income correctly were missing, as respondent well knew. This situation was serious enough to cause respondent's bookkeeper, for his own information, to number the books. (R. 130-131.) Because the books of the business were made up on the basis of such original records (R. 127-128), respondent necessarily knew his receipts were understated. This, too, showed wilfulness. *Barrow v. United States*, 171 F. 2d 286, 287 (C.A. 5).

Similarly, respondent's awareness of the absurdly incorrect income reflected on his books and returns was proved by the testimony of his bookkeeper, Verdugo, that he advised respondent to get out of the vending machine business since the 1948 return indicated the business was actually losing money (R. 129-130). This advice was ignored. Plainly respondent knew the picture reflected on the return was wrong. *Barrow v. United States, supra*. His obvious unconcern, together with the facts of missing receipt books, missing invoices on coin machines (R. 89), and the many omissions from the books kept (R. 89), all reflect the conduct of the business in a manner the likely effect of which would be to conceal and mislead. *Spies v. United States*, 317 U. S. 492, 499.

Finally, the independent evidence showed that many of the coin-operated machines purchased by respondent were purchased for cash (R. 90-91).

The source of this cash in receipts could not be traced. In many cases invoices had not been entered (R. 88). The existence of a good many of the machines was not even shown on the books (R. 89). And since the machines were the means of producing income, their number and location would plainly have been necessary to an adequate set of books. The absence of such data was a further badge of concealment. *Spies v. United States, supra.*

2. When respondent's admissions that he had failed to report taxable income are read together with the foregoing independent evidence, the unsubstantiality of his argument that there was no proof of wilfulness is clear. His admissions show that receipts from thirteen locations in which his machines had been placed were consciously and deliberately understated (R. 109). As a result, while he knew of his tax obligation, he persistently filed returns which, despite the sizeable income he enjoyed, showed not a single cent owing to the Government. Plainly, the jury was entitled to conclude that respondent's conduct reflected a bad purpose and evil motive. *United States v. Murdock*, 290 U. S. 389, 394-395; *Spies v. United States, supra*; *Rutkin v. United States*, 343 U. S. 130, 135.

IV

**Respondent Is Not Entitled to Seek a Judgment of
Acquittal Here**

At the end of his brief (p. 68), respondent suggests that the judgment of the Court of Appeals, which reversed his conviction and ordered a new trial (R. 229), should be modified, and that a judgment of acquittal should be ordered by this Court. Cf. *Bryan v. United States*, 338 U. S. 552. Respondent filed no cross-petition for certiorari. He may not now attack the portion of the judgment he considers adverse to him. *Morley Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191; *LeTulle v. Scofield*, 308 U. S. 415, 421-422.

Respectfully submitted

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OCTOBER, 1954.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

No. ~~100~~ 25

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDWARD B. CALDERON,
Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTE INVOLVED	2
STATEMENT	2
ARGUMENT	7
(1) Contention That The Decision Below Is inconsistent With Other Circuits	7
(2) Contention That The Instant Decision Is An Obstacle To Future Law Enforcement	9
(3) Concerning The Proof Of Corpus Delicti ...	12
CONCLUSION	15

CITATIONS

Cases

<i>Adams v. Maryland</i> , 22 L. W. 4150, No. 271 Oct. Term 1953	11
<i>Bell v. United States</i> , 185 F. 2d 302 (C. A. 4) cert. den. 340 U. S. 930	13
<i>Bryan v. United States</i> , 175 F. 2d 223 (C. A. 5)	7
<i>Dacche v. United States</i> , 250 Fed. 566 (C. A. 2)	12
<i>Davena v. United States</i> , 198 F. 2d 230 (C. A. 9)	7
<i>Demetree v. United States</i> , 207 F. 2d 892, 893 (C. A. 5)	9, 14

	PAGE
<i>Gariepy v. United States</i> , 189 F. 2d 459 (C. A. 6) . . .	14
<i>Helvering v. Mitchell</i> , 303 U. S. 391	12
<i>McFee v. United States</i> , 206 F. 2d 872 (C. A. 9) cert. den. No. 414, 1953 Term, March 22, 1954	7
<i>Remmer v. United States</i> , 205 F. 2d 277 (C. A. 9) reversed No. 304, 1953 Term, March 8, 1954. .7, 8, 9, 13	
<i>Sasser v. United States</i> , 208 F. 2d 535 (C. A. 5)	8
<i>Spies v. United States</i> , 317 U. S. 492, 498, 499	14
<i>Spriggs v. United States</i> , 198 F. 2d 230 (C. A. 9) . . .	7
<i>United States v. Chapman</i> , 168 F. 2d 977 (C. A. 7) . .	8
<i>United States v. Fenzwick</i> , 177 F. 2d 488 (C. A. 7) . . .	7
<i>United States v. Hornstein</i> , 176 F. 2d 217 (C. A. 7) . .	8, 13
<i>United States v. Venuto</i> , 182 F. 2d 519 (C. A. 3) . . .	7
<i>United States v. Yeoman-Henderson</i> , 193 F. 2d 867 (C. A. 7)	8

Statutes

Internal Revenue Code	
Sec. 145 (b) (26 U. S. C. 1946 ed., Sec. 145)	2
Sec. 41 (26 U. S. C. 1946 ed., Sec. 41)	13

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

UNITED STATES OF AMERICA,
Petitioner.

vs.

EDWARD B. CALDERON,
Respondent.

No. 577

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 218-219) is reported at 207 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1953 (R. 220). A petition for rehearing was denied on December 8, 1953 (R. 220). The petition was served on respondent on February 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., 1254.

QUESTIONS PRESENTED

1. Where an income tax evasion prosecution is based upon an increase in net worth, is this circumstantial evidence which must exclude every reasonable hypothesis other than that it was derived from current taxable income?

2. In an income tax evasion prosecution, is the Government required to prove some portion of the corpus delicti

by independent evidence before the defendant's extrajudicial admissions may be introduced as evidence against him?

3. In an income tax evasion prosecution based on proof of unexplained increases in net worth, must the Government prove each pertinent item of the net worth statement at the starting point to a reasonable certainty?

STATUTE INVOLVED

Internal Revenue Code:

Sec. 145 (b):

" . . . any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisonment for not more than five years, or both, together with the costs of prosecution." (26 U. S. C. 1946 ed., Sec. 145)

STATEMENT

Respondent was charged with wilfully attempting to evade his own and his wife's joint income tax liabilities for the years 1946, 1947, 1948, and 1949, in violation of Section 145(b) of the Internal Revenue Code (R. 3-6). He was an operator of a small legitimate coin-machine business in Douglas, Arizona (R. 156-157, 180). He had a meager education, having gone two months to high school, and had started in business with two machines (R. 153, 154). Being unfamiliar with books and records,

he obtained the services of his brother's boss, Mr. Speer, an elderly man who operated a confectionery store. Speer told respondent to get some sales books, and then proceeded to keep books for the respondent in a complete, but rather primitive way, from about 1936 to about 1943 (R. 133, 134, 157, 158). During that period, Speer made out respondent's income tax returns (R. 158).

In 1943, Speer's health failed, and respondent obtained the services of a friend, Eugene C. Verdugo, on a part-time basis to keep the books and prepare the income tax returns (R. 134, 158, 159). Verdugo, whose occupation was manager of a lumber company, did this work as a favor to respondent (R. 127, 134). He prepared the tax returns from 1943 to 1950 inclusive (R. 128-129). During the course of the investigation by the Internal Revenue agents, Verdugo and respondent cooperated with them, and turned over all of respondent's books and records (R. 87, 140). Verdugo told the agents that in his own mind he was sure that respondent never intended to defraud anybody (R. 141).

The Government offered no direct evidence of any income received by respondent and not reported on his income tax returns. It did not offer in evidence the books and records of respondent, upon which the returns were based (R. 129), and did not contend that they were inadequate. It based its case solely on the contention that there was an increase in the visible net worth of respondent each year in excess of the reported income (Br. 3).

At the trial the following stipulation was entered into (R. 8-9):

"It is hereby stipulated that with reference to the assets and liabilities of the defendant as of December

31 of each of the years 1945 to 1949, inclusive, with the exception of the items of assets designated as 'cash on hand' and 'cash in bank' that the Government witness, Special Agent Lloyd M. Tucker, may testify from his reports as to the total of the items going to make up said assets and liabilities without producing any supporting documents or records. It is further stipulated as to items of 'disbursements' and 'expenditures' made by the defendant during the years enumerated which are claimed by the Government to be non-deductible, the said witness may testify as to the total of such items for the years above enumerated without producing any supporting records."

The Government offered no independent evidence of the item "cash on hand", but relied solely upon alleged verbal admissions of respondent. In fact, the Government made no attempt to offer any evidence, except the defendant's extrajudicial admissions, to exclude any of the other sources of expendable assets in the hands of the defendant which would have justified the alleged increase in net worth. No evidence of lack of previous savings, lack of previous or immediate inheritances to himself or wife or lack of previous resources was presented. For a beginning to the net worth statement, the Government relied entirely upon the alleged admissions of the respondent.

On direct examination Agent Tucker testified that respondent told him he had \$500.00 on hand on the last day of each year. But when the Agent pointed out that on January 4, 1950, respondent had deposited \$1,971.50 in cash in a bank account, which must have come from receipts carried over from the end of the previous year, the Agent claimed respondent "informed" him that he had \$500.00

"in cash on hand at the end of 1945, 1946, 1947, and 1948, and \$1,971.50 at the end of 1949" (R. 59-60).

On cross-examination, respondent offered in evidence as Defendant's Exhibit A, the typewritten notes of Agent Tucker in which he made a memorandum of his conversation with respondent. This exhibit stated that respondent told Agent Tucker: "On January 1, 1944, he had approximately \$500.00 in cash *in his pocket*. He believes that because it is his habit to carry that much money in his pocket at all times" (*italics supplied*) (R. 82). Agent Tucker also testified:

"This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times. It is obvious that he had more cash at times because his savings account shows he deposited one thousand or two thousand or more at a time, so it is evident he had it the day before he deposited it and probably for days or weeks before" (R. 85).

The Government introduced in evidence as Exhibit 11, an affidavit of respondent, prepared by the agents. The agents did not include in this affidavit any reference to the alleged \$500.00 cash on hand or in pocket at the end of each year. The only pertinent reference to cash on hand is the statement: "Excess receipts I accumulated in my safe for short periods of time and then deposited such moneys in my savings account" (R. 107-110).

Respondent testified he kept a safe in his home in which he kept a reserve of cash. He testified he had \$16,000 to \$17,000 at the end of 1945, and about \$3,000 to \$4,000 at the beginning of 1949 (R. 164-165). Verdugo told the agents that respondent carried plenty of cash in his safe, be-

cause of the nature of his business; he had to be making change, cashing checks and so forth, for his locations (R. 138). The agents never inquired how much money was in the safe (R. 85, 139).

The item of "cash on hand" was the principal issue in the case. At the inception of the trial respondent stipulated to all items on the net worth statement except "cash on hand" and "cash in bank" (R. 8-9). Throughout the trial, respondent objected to evidence offered on these items, and made appropriate motions to dismiss the indictment and to render a verdict for respondent, due to the failure of the Government to prove with reasonable accuracy the starting point of the net worth statement.

The Court of Appeals for the Ninth Circuit reversed the conviction (R. 220). The Court held that the burden of proof was on the Government as to each pertinent starting item of the net worth statement to a reasonable certainty. Since there was no independent proof of any portion of the corpus delicti, the extra-judicial written and oral statements of the defendant were not competent or admissible to establish the starting items of the net worth statements. The Court indicated that the admissions of the defendant as related by government agents were insufficient to establish the item of "cash on hand" anyway. Thus the prepared "Net Worth" statements had no valid probative value. There being no other evidence of any sort to establish "cash on hand" or to dispute the hypothesis in favor of innocent sources of present assets, there was no evidence to support the conviction (R. 219).

ARGUMENT

The Government contends the decision below (1) constitutes a substantial obstacle to the effective enforcement of the provisions of the internal revenue laws proscribing fraudulent tax evasion, and (2) is also inconsistent in principle with holdings in other circuits (Br. 7, 9).

(1) Contention That the Decision Below Is Inconsistent with Other Circuits.

Among cases cited as holdings by other circuits inconsistent in principle with the decision below, the Government included one from this same Ninth Circuit, *Remmer v. United States*, 205 F. 2d 277 (No. 304, 1953 Term, remanded for a hearing on other grounds, March 8, 1954). The Government's petition makes no mention of holdings of the Third, Fifth and Seventh Circuits which are in accord with the decision below, *Bryan v. United States*, 175 F. 2d 223 (C. A. 5), *United States v. Fenwick*, 177 F. 2d 488 (C. A. 7), and *United States v. Venuto*, 182 F. 2d 519 (C. A. 3). The court below cited the Bryan and Fenwick cases.

This contention that the decision below is inconsistent in principle with other decisions of the same Court demonstrates the weakness in the Government's position. The Ninth Circuit has had no difficulty in applying the principles involved. In *Spriggs v. United States*, 198 F. 2d 230 (C. A. 9) and the instant case it applied these principles in reversing convictions. In *Davena v. United States*, 198 F. 2d 230 (C. A. 9), *McFee v. United States*, 206 F. 2d 872 (C. A. 9), No. 414, 1953 Term, certiorari denied March

22, 1954, and *Remmer v. United States, supra*, it applied these principles in affirming convictions.

The Fifth Circuit applied these principles in reversing the conviction in the Bryan case, and affirming a conviction in *Sasser v. United States*, 208 F. 2d 535 (C. A. 5). The Seventh Circuit reversed in the Fenwick case, and affirmed convictions in *United States v. Chapman*, 168 F. 2d 997 (C. A. 7), certiorari denied 335 U. S. 853, *United States v. Hornstein*, 176 F. 2d 217 (C. A. 7), and *United States v. Yeoman-Henderson*, 193 F. 2d 867 (C. A. 7).

The decision below was not the result of applying a different or conflicting principle of law, but was due to a failure of proof by the Government. It is unnecessary to cite the many cases involving net worth where convictions have been upheld. The Courts of Appeals have had no difficulty in applying principles applicable to circumstantial evidence, and protecting defendants' rights in net worth cases. The Bryan, Fenwick, and Calderon cases appear to be the only ones where the evidence was based *solely* upon net worth computations unsupported by independent evidence of some portion of the crime. In those cases, the convictions were declared erroneous because of lack of evidence tested by ordinary rules of criminal procedure and evidence.

On the other hand, where reasonably cogent evidence from independent sources has been compiled and presented through earnest and thorough investigation, convictions based upon net worth have been upheld. In *United States v. Chapman, supra*, cited by the Court below, the court stated, p. 1001:

"In a net worth case, the starting point must be based upon a solid foundation and a Revenue Agent's state-

ment of the defendant's oral admission or confession when uncorroborated is not sufficient to convict."

The Seventh Circuit sustained that conviction based upon ample independent proof not found in the present case. The failure of the Government to produce competent independent proof against respondent after two trials, is a strong indication that evidence of guilt is lacking. As the court below stated in *Remner v. United States*, *supra*, p. 280:

"The fundamental question presented is what quantum of evidence must be offered by the Government before a trial court can properly submit the case to the jury. Whether sufficient evidence has been introduced in a given case will of course depend upon the facts of that particular case."

The conclusion is inescapable that the decision below is not in conflict in principle with decisions of the same, or other circuits. The court below applied well established and sound principles of criminal law in holding that under the facts of this case a conviction could not be sustained.

(2) Contention That the Instant Decision Is an Obstacle to Future Law Enforcement.

The decision below, far from constituting an obstacle to effective enforcement, is a healthy recognition, by the court, of the danger of violation of defendants' constitutional rights by the Government's unbridled use of the net worth method of computing net income. The Fifth Circuit recently made the following comment in *Demetree v. United States*, 207 F. 2d 892, 893 (C. A. 5):

"This is another of the growing list of criminal cases in which the Government, having no or little direct

evidence of the defendant's guilt to offer and endeavoring to prove it by circumstantial evidence, attempts to do so by what may be called a net worth and expenditures method of proof. In this attempt, unless the greatest care is taken by the District Judge to prevent it, there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendants income to take the place of proof of it."

In its Brief, the Government ingeniously assumes that a net worth computation somehow establishes unreported income although the beginning assets and liabilities on which it is based are not sustained by any proof, and are mere hypotheses of the Government accountant who set up the net worth statement. The Government theory seems to be that the mere possession of more *apparent* assets in 1949 than in 1946 establishes the difference in value of such visible assets as "income." From this false premise it then seeks to shift the burden of proof to the defendant to establish his innocence. In short, merely because a person has more visible, or more readily ascertainable assets in 1949 than he had in 1946, he can be successfully charged with income tax evasion if the difference in value of such property exceeds the amount on which he has previously paid income taxes.

From this same false premise the Government reasons that proof of the beginning assets (cash on hand) is not an essential element of the offense (Br. p. 7). This broad generalization fails to take into account the situation in which, as here, there is no outside evidence of the offense

at all, and the beginning assets of the net worth computation establish or refute the *fact* of one element of the crime itself.

In its petition the Government states "that the existence and amount of cash on hand are peculiarly within the knowledge of the defendant, and that *his failure* to present such evidence should not overcome an otherwise convincing showing of understatement of income" (Br. 9) (*italics supplied*). This insistence that the *exclusive* source of proof is the defendant's admissions is an admission that the Government contends a taxpayer should be forced to incriminate himself. However, in its attempt to find quick and easy means of completing investigations in tax cases, it overlooked the fact that prosecutors every day overcome similar obstacles in a variety of cases. There are many crimes in which the defendant's state of mind or knowledge is an essential element, such as perjury, knowledge of the counterfeit character of money, intent to defraud, and many others. The only source of accurate proof in these cases is the defendant's admissions, but Government agents always find enough "other" proof to establish this element beyond a reasonable doubt.

This is analogous to the situation in *Adams v. Maryland*, 22 L. W. 4150 No. 271 Oct. Term 1953, where this Court held a state court could not use testimony given by a defendant before a Congressional Committee to convict him. Justice Jackson stated the decision did not take anything from the state—but "she just has to work up her own evidence". Here the Court of Appeals simply told the Government it had to work up its own independent evidence of tax evasion before it could rely on a defendant's admissions.

The Government has lost sight of the distinction between civil and criminal tax cases. In civil tax cases, the determination of the Commissioner of Internal Revenue is prima facie evidence of a tax liability which the taxpayer must refute, but it is of no weight at all in a criminal case. *Hekiering v. Mitchell*, 303 U. S. 391. Apparently what the Government is seeking is a special set of rules of criminal evidence and law to be applied to income tax prosecutions alone so that the administrative fiat of the Commissioner of Internal Revenue will be sufficient to require a given defendant to prove his innocence.

(3) Concerning the Proof of Corpus Delicti

In *Dacche v. United States*, 250 Fed. 566 (C. A. 2), Judge Learned Hand clearly put into unquestioned judicial language the rule requiring proof of the corpus delicti as a safeguard before permitting a defendant to be prosecuted and convicted on the basis of his own admissions or confessions. The proof of the corpus delicti, or the corroboration thereof, must touch such corpus delicti in the sense of the injury against whose occurrence the law is directed and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently such proof need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof. The application of this corpus delicti rule has been, and remains, quite liberal. It is only where, as here, the Government attempts to convict a defendant solely by his own admissions that it is prevented from presenting such extra-judicial statements of the defendant. In the instant case, if respondent had

really been guilty, the Government would have had no difficulty in securing evidence, independently of respondent's admissions, which would have established some portion of the corpus delicti and thus made his admission competent proof.

Here the Government did not offer any evidence of "an otherwise convincing showing of understatement of income." It failed to prove essential elements of the offense. It did not offer in evidence the books and records of the respondent, nor claim that they were inadequate to clearly reflect his income, although such a finding is a prerequisite to use of the net worth method pursuant to Section 41 of the Internal Revenue Code. *Remmer v. United States, supra*, p. 286. It offered no direct evidence of *any income* received by respondent, and did not connect the alleged increase in net worth with any source of current income.

The basis of net worth computation prosecutions begins with elementary accounting principles. Without accurate starting entries, no accountant or bookkeeper would attempt to set up, or to maintain, an accurate set of books. Without such accurate starting items as, say Cash On Hand, the remainder of any accounting statement made for the purpose of establishing amounts of income, proves nothing. To prove these starting items of a net worth computation with reasonable accuracy is certainly no more difficult than to prove the fact of death and the manner of death in a murder prosecution. Yet, no one has ever suggested that the mere fact that a person died in the presence of a given defendant is sufficient to put such defendant on proof of his innocence of the crime of murder. Cases such as *Bell v. United States*, 185 F. 2d 302 (C. A. 4) certiorari denied, 340 U. S. 930, *Hornstein v. United States supra*, *Remmer v. United States*,

supra, and *Garipey v. United States*, 189 F. 2d 459 (C. A. 6) all establish that there are many sources, and many means, available to a careful and diligent prosecutor which will furnish sufficient accurate information for the beginning of a net worth computation.

In *Spies v. United States*, 317 U. S. 492, 498-499, this Court held that to prove wilful evasion there must be some "affirmative action", some "element of evil motive, or concealment." Here there was no evidence except a bare increase in the value of visible tangible assets, with no independent proof of an essential element. The Court below correctly held that since there was no independent evidence of income tax evasion, the corpus delicti had not been shown, and therefore respondent's admissions could not be used in evidence. There was in fact, in the record, no evidence at all of Cash on Hand by respondent's admissions or otherwise. The only evidence offered was the oral statement of Agent Tucker, who included in the net worth statement only \$500.00 cash on hand for 1946, 1947, and 1948, yet admitted on cross-examination that respondent had not told him he had \$500.00 cash on hand on December 31, 1945, 1946, and 1947 (R. 80-87).

It has been said that "hard cases make bad law." The observation in *Demetree v. United States*, *supra*, p. 894 is pertinent:

"This court and other courts have, in many cases, pointed out the dangers attending trials conducted in this way. Some of them have at times seemed to be more concerned with easing the difficulties attending the proof of guilt by this method than in preserving unimpaired the constitutional rights of a defendant, the fundamental safeguards and the guarantee of his liberty. Most of the courts, however, con-

fronted with the situation which this kind of case presents, have withstood all attacks upon, and have held fast to, constitutional principles, including the fundamental premise upon which criminal trials proceed, that the defendant is presumed innocent until his guilt is established by a legal and admissible evidence beyond a reasonable doubt."

CONCLUSION

The decision below is in all respects correct and there is no conflict of decision. It is, therefore, respectfully submitted that the petition should be denied.

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IN THE
Supreme Court of the United States
October Term, 1954

No. 25

UNITED STATES OF AMERICA,
Petitioner,
vs.

EDWARD B. CALDERON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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I N D E X

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of Argument	10
 Argument:	
I. There were no admissions to agents by respondent of cash on hand at the beginning of any year	16
II. In a prosecution for income tax evasion the corpus delicti includes each of the essential elements of the offense	19
III. Where the net worth method is used to establish income tax evasion, the Government must prove as essential elements (1) that the taxpayer's books and records were not available or were inadequate to determine income, (2) a source of income to account for the increase in net worth, (3) a fixed starting point at which the taxpayer's financial condition is affirmatively established with some definiteness, and (4) that increases in net worth were not from non-taxable income or receipts	22
1. Unreliability of net worth method as proof of income	23

	PAGE
2. Adequacy of books and records	27
3. Source of income	30
4. Starting point	31
5. Current taxable income	34
IV. In net worth cases cash on hand is an essential element which the Government must prove to a reasonable certainty	36
V. The court below properly held that the Gov- ernment had not proven the corpus delicti by independent evidence	48
VI. There was no evidence of willfulness	61
VII. The decision of the court below reversing the conviction was correct	66
Conclusion	68

CITATIONS

Cases:	PAGE
<i>Barcott v. United States</i> , 169 F. 2d 929 (C. A. 9)	58
<i>Bechelli v. Hofferbert</i> , 111 F. Supp. 631 (D. C. Md.)	29
<i>Bell v. United States</i> , 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930	28, 31, 45
<i>Booker W. Evans v. Commissioner</i> , CCH Dec. 20, 065 (M), 12 TCM 1470	27
<i>Brinegar v. United States</i> , 338 U. S. 160	66
<i>Bryan v. United States</i> , 175 F. 2d 223 (C. A. 5), affirmed on other grounds, 338 U. S. 552	34, 66
<i>Buttermore v. United States</i> , 180 F. 2d 853 (C. A. 6)	27
<i>Casey v. United States</i> , 276 U. S. 413	42
<i>Chapman v. United States</i> , 168 F. 2d 997, 1001 (C. A. 7), certiorari denied 335 U. S. 853	60
<i>Dacche v. United States</i> , 250 F. 566 (C. A. 2)	49, 50, 51
<i>Davena v. United States</i> , 198 F. 2d 230, (C. A. 9), certiorari denied 344 U. S. 878	31, 58
<i>Demetree v. United States</i> , 207 F. 2d 892 (C. A. 5)	10, 25, 45
<i>Ford v. United States</i> , 210 F. 2d 313 (C. A. 5)	32
<i>Forte v. United States</i> , 94 F. 2d 236 (C. A. D. C.), affirmed on other grounds, 302 U. S. 220	49
<i>Garipey v. United States</i> , 189 F. 2d 459 (C. A. 6)	28
<i>Gendleman v. United States</i> , 191 F. 2d 993 (C. A. 9)	31, 58
<i>Murray Glackman v. Commissioner</i> , CCH Dec. 18, 692 (M), 10 TCM 1132	27
<i>Gleckman v. United States</i> , 80 F. 2d 394 (C. A. 8), certiorari denied 297 U. S. 709	11, 24
<i>Goldbaum v. United States</i> , 204 F. 2d 74 (C. A. 9)	58
<i>Gulotta v. United States</i> , 113 F. 2nd 683 (C. A. 8)	61

	PAGE
<i>Hanson v. United States</i> , 208 F. 2d 914 (C. A. 6)	66
<i>Julius M. Hooper v. Commissioner</i> , CCH Dec. 19, 874 (M), 12 TCM 1017	48
<i>Ameen Jacob v. Commissioner</i> , CCH Dec. 17, 664 (M), 9 TCM 415	27, 29
<i>Jelaza v. United States</i> , 179 F. 2d 202 (C. A. 4)	27, 45
<i>Kirsch v. United States</i> , 174 F. 2d 595 (C. A. 8)	43
<i>King Tsak Kwong v. Commissioner</i> , CCH Dec. 19, 924 (M), 12 TCM 1136	64
<i>Lurding v. United States</i> , 179 F. 2d 419 (C. A. 6)	11, 24, 27, 30, 63, 64
<i>Estate of Maurice J. Lydon v. Commissioner</i> , CCH Dec. 19, 306 (M), 11 TCM 1119	44, 47
<i>McFee v. United States</i> , 206 F. 2d 872 (C. A. 9)	59, 60
<i>Mitchell v. United States</i> , 208 F. 2d 854 (C. A. 8)	31
<i>Morrison v. California</i> , 291 U. S. 82	42
<i>Olender v. United States</i> , 210 F. 2d 795, (C. A. 9)	35
<i>Pollock v. United States</i> , 202 F. 2d 281 (C. A. 5) certiorari denied 345 U. S. 993	27, 60
<i>Remmer v. United States</i> , 205 F. 2d 277, (C. A. 9), vacated and remanded, 347 U. S. 227	27, 28, 34, 59, 60
<i>Rossi v. United States</i> , 289 U. S. 89	41
<i>Sasser v. United States</i> , 208 F. 2d 535 (C. A. 5)	27
<i>Schuerman v. United States</i> , 174 F. 2d 397 (C. A. 8), certiorari denied 338 U. S. 831	11, 24, 30
<i>Smith v. United States</i> , 210 F. 2d 496, (C. A. 1) No. 52 this Term	45
<i>Maurice A. Spalding v. Commissioner</i> , CCH Dec. 19, 832 (M), 12 TCM 883	44
<i>Spies v. United States</i> , 317 U. S. 492	61, 63, 65
<i>Spriggs v. United States</i> , 198 F. 2d 782 (C. A. 9)	59, 60

<i>Thomas A. Talley v. Commissioner</i> , Docket Nos. 33140, 33141, 20 TC No. 101	11, 26, 27, 29
<i>Estate of Halley Tarr v. Commissioner</i> , CCH Dec. 19, 326 (M), 11 TCM 1151	44
<i>Tot v. United States</i> , 319 U. S. 463	42
<i>United States v. Casserta</i> , 199 F. 2d 905 (C. A. 3) ..	10, 27, 35, 46
<i>United States v. Wilbur I. Clark</i> , (S. D. Cal.) decided August 4, 1954, unofficially reported 1954 CCH Par. 9546	24, 46
<i>United States v. Fenwick</i> , 177 F. 2d 488 (C. A. 7) ..	13, 21, 33, 66
<i>United States v. Fleischman</i> , 339 U. S. 349	42
<i>United States v. David Friedberg</i> , D. C. Ohio, unofficially reported, 53-2 USTC, par. 9632, affirmed 207 F. 2d 777, certiorari granted, 347 U. S. 1006, No. 18 this Term	28, 33, 44
<i>United States v. Glazer</i> , 110 F. Supp. 558 (E. D. Mo.)	22
<i>United States v. Johnson</i> , 123 F. 2d 111 (C. A. 7) affirmed 319 U. S. 503	11, 22, 24, 30, 45
<i>United States v. Martell</i> , 199 F. 2d 670 (C. A. 3) ..	64
<i>United States v. Murdock</i> , 290 U. S. 389	63
<i>United States v. Potson</i> , 171 F. 2d 495 (C. A. 7) ..	30
<i>United States v. Riganto</i> , 121 F. Supp. 158, 159 (E. D. Va.)	10, 11, 26
<i>United States v. Schenck</i> , 126 F. 2d 702 (C. A. 2) ..	22
<i>United States v. Skidmore</i> , 123 F. 2d 604 (C. A. 7), certiorari denied 315 U. S. 800	30
<i>United States v. Smith</i> , 206 F. 2d 905 (C. A. 3) ..	31
<i>United States v. Vassallo</i> , 181 F. 2d 1006 (C. A. 3) ..	30
<i>United States v. Waldon</i> , 114 F. 2d 982 (C. A. 7), certiorari denied 312 U. S. 681	57
<i>United States v. Williams</i> , 208 F. 2d 437	27

<i>James Q. Whittemore v. Commissioner</i> , CCH Dec. 16, 700 (M), 7 TCM 845	27, 44
<i>Yee Hem v. United States</i> , 268 U. S. 178	42

Statutes:

Internal Revenue Code (1939 ed.):

Sec. 41 (26 U. S. C., 1946 ed., Sec. 41) . . .	2, 12, 27, 28
Sec. 145 (b) (26 U. S. C., 1946 ed., Sec 145 (b)) . .	3, 21

Miscellaneous:

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IN THE
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UNITED STATES OF AMERICA,

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EDWARD B. CALDERON,

Respondent,

No. 25

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 218-219) is reported at 207 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1953 (R. 220). A petition for rehearing, filed on November 22, 1953, was denied on December 8, 1953 (R. 220). The petition for a writ of certiorari was filed on February 4, 1954, and was granted on June 7, 1954 (R. 223). The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Where an income tax evasion prosecution is based upon an increase in net worth, is this circumstantial evidence which must exclude every reasonable hypothesis other than that it was derived from current taxable income?

2. In an income tax evasion prosecution, must there be some independent proof of the corpus delicti before the Government may rely upon a defendant's extra-judicial admissions?

3. In an income tax evasion prosecution based on proof of unexplained increases in net worth, must the Government prove each pertinent item of the net worth statement at the starting point to a reasonable certainty?

4. May the Government use the net worth method without showing that the taxpayer's books were inadequate to clearly reflect his income, without offering his books in evidence, and without pointing to any specific income which was omitted from his books or income tax return?

5. Where the sole proof of unreported income is based upon increases in net worth alone, is that evidence from which a jury may properly find an intent to evade taxes, or must the Government offer independent evidence of willfulness?

STATUTES INVOLVED

Internal Revenue Code (1939 ed.):

Sec. 41. General Rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal

year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (Title 26, USC 1946 ed., Sec. 41)

Sec. 145 (b). Penalties.

* * * and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (Title 26 USC 1946 ed., Sec. 145 (b))

STATEMENT

Respondent was charged with willfully attempting to evade his own and his wife's joint income tax liabilities for the years 1946, 1947, 1948 and 1949, in violation of Section 145(b) of the Internal Revenue Code (1939 ed.) (Title 26 U. S. C. 1946 ed. Sec. 145(b)) (R. 3-6). He was an operator of a small legitimate coin-machine business in Douglas, Arizona (R. 156-157, 180). He had a meager education, having gone to high school only two months, and

had started in business with two machines in 1935 (R. 153, 154). Being unfamiliar with books and records, he obtained the services of his brother's employer, a Mr. Speer, an elderly man who operated a confectionery store. Speer told respondent to get some sales books, and then proceeded to keep books for the respondent in a complete, but rather primitive way, from about 1936 to about 1943 (R. 133, 134, 157, 158). During that period, Speer made out respondent's income tax returns (R. 158).

In 1943, Speer's health failed, and respondent obtained the services of a friend, Eugene C. Verdugo, on a part-time basis to keep the books and prepare the income tax returns (R. 134, 158, 159). Verdugo, whose occupation was manager of a lumber company, did this work as a favor to respondent (R. 127, 134). Verdugo was not an accountant or tax expert; but used his knowledge of bookkeeping to do outside extra work for friends to augment his income (R. 133). He prepared the tax returns from 1943 to 1950 inclusive (R. 128-129). During the course of the investigation by the internal revenue agents, Verdugo and respondent cooperated fully with them, and turned over all of respondent's books and records (R. 87, 88, 140, 172-173).

During the war respondent had music boxes, automatic pinball machines and cigarette machines at various locations in the city of Douglas and surrounding territory (R. 156-157). He also had slot machines at the Douglas Air Base, outside of Douglas, where they were allowed (R. 161). Business was very good during the war years, but since he could not buy new equipment, he did not have to spend much money (R. 161-163).

When he began operations in 1935 he kept his money at home in a trunk (R. 157), but about 1944 or 1945 began

to use a safe (R. 163). The nature of his business required him to keep large amounts of cash and change in that safe (R. 138, 163). Although he made some deposits in banks, he built up a reserve in cash in the safe which amounted to \$16,000 or \$17,000 at the end of December 1945 (R. 164). During 1946 when new equipment became available, he purchased about \$16,000 worth of new machines (R. 64-66, 164-165). Approximately \$15,000 of these purchases represented cash outlay (R. 91). The purchases of equipment reduced the amount of cash in the safe to \$3,000 or \$4,000 at the end of 1949 (R. 165).

Verdugo made entries in the books from information supplied by respondent. He was given a list of locations for every month, and the amounts taken in from each location. He also had a roll of invoices and a list of checks for each month (R. 127-128). To avoid the possibility of any receipt books being lost or misplaced by respondent or his employees, Verdugo numbered them in sequence (R. 130-131).

The Government offered no direct evidence of any income received by respondent and not reported on his income tax returns. It did not offer in evidence the books and records of respondent, upon which the returns were based (R. 129), and did not contend that they were inadequate. The agent admitted the books were set up in an acceptable form. He found no mathematical errors, but in his opinion a good deal of the coin-operated machines money was not recorded in the books (R. 89). But no direct evidence was offered of any income omitted.

The Government called only five witnesses: two bank officers who identified records, Deputy Collector Webb and Special Agent Tucker of the Bureau of Internal Revenue

who conducted the investigation of respondent's income tax liability, and Mr. Verdugo (R. 31, 34, 40, 50, 127). Only Mr. Verdugo had any knowledge of respondent's business or income, and that was derived entirely from respondent. He had no independent knowledge of respondent's business (R. 129).

The only evidence offered by the Government of any income of respondent above that reported on his income tax returns was the admission of respondent in Government's Exhibit 11 (R. 106-110). For proof of understatement of income the Government relied entirely upon "increases in respondent's net worth plus non-deductible expenditures" (Br. 4). The agents had obtained respondent's signature to a formal net worth statement which they had prepared, respondent's Exhibit B (R. 50, 52, 87, 195, Br. appendix), but the Government did not offer it in evidence.

During the investigation the agents had interviewed respondent several times (R. 90, 175). On August 2, 1950 Agent Tucker, prepared Exhibit 11, and had respondent sign it (R. 106). Webb testified that the net worth statement had been prepared previously, and that after going over it with respondent, he signed it, although the agents had not asked him to do so (R. 123-124). Respondent testified that he did not understand Exhibit B, but signed it solely because his bookkeeper, Verdugo, said it was all right to do so (R. 176-177, 187). Verdugo testified that he was shown the net worth statement by the agents, but that he made no independent investigation of the figures on it, and did not know a thing about any of them. He relied entirely upon the agents as to the accuracy of the figures, and simply approved the procedure they had followed (R. 140-141).

Agent Tucker also testified that respondent relied upon Verdugo, and that the latter had stated: "I don't know about all the figures on it but it is a commonly used method of determining income and it looks all right to me" (R. 87).

For purposes of the trial respondent stipulated that Special Agent Tucker might testify as to all of the items on the net worth statement with the exception of assets designated as "cash on hand" and "cash in bank" (R. 8-9, 54). This net worth statement, Exhibit B (Br. App.) (which was used by Tucker as notes for his oral testimony) lists as "cash on hand" \$500 on December 31st of each of the six years 1943 to 1948 inclusive, and \$1,971.50 on December 31, 1949. On direct examination Tucker testified that respondent had told him that to the best of his recollection "he would have had \$500.00 on hand on the last day of each year" (R. 59). However, when Tucker pointed out a cash deposit in the bank of \$1,971.50 on January 4, 1950, and asked whether it would be possible to accumulate that much cash between January 1 and January 4, respondent accepted Tucker's suggestion that it must have been some receipts carried over from the end of the year. Tucker testified that respondent then said he had \$500 in cash on hand on December 31st of every year except 1949, when he had exactly \$1,971.50 (R. 59, 60).

On cross-examination Tucker admitted that what respondent actually had said was that he ordinarily carried \$500 in his pocket (R. 80, 86). Over the Government's objection, respondent offered in evidence the typewritten notes (Respondent's Exhibit A) from which Tucker had been testifying, which purported to be a memorandum of his conversation with respondent (R. 81). This exhibit stated that respondent told Agent Tucker: "On January 1,

1944, he had approximately \$500.00 in cash *in his pocket*. He believes that because it is his habit to carry that much money in his pocket at all times" (italics supplied) (R. 82). Agent Tucker also testified:

"This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times. It is obvious that he had more cash at times because his savings account shows he deposited one thousand or two thousand or more at a time, so it is evident he had it the day before he deposited it and probably for days or weeks before. Of course at times he had more cash than that." (R. 85)

In Exhibit 11, the affidavit of respondent prepared by the agents, the agents did not include any reference to the alleged \$500.00 cash on hand or in pocket at the end of each year. The only pertinent reference to cash on hand is the statement: "Excess receipts I accumulated in my safe for short periods of time and then deposited such moneys in my savings account" (R. 107-110). Verdugo also told the agents that respondent carried plenty of cash in his safe, because of the nature of his business; he had to be making change, cashing checks and so forth, for his locations (R. 86, 138). The agents never inquired as to how much money was in the safe (R. 80, 85, 139, 176).

The Government offered no independent evidence of the item "cash on hand", but relied solely upon alleged verbal admissions of respondent. In fact, the Government made no attempt to offer any independent evidence to exclude the hypothesis that the funds respondent used to acquire the assets listed in the agents' net worth statement might have been from sources other than current business income.

No independent evidence of lack of previous savings, lack of previous or immediate inheritances to himself or wife or lack of previous resources was presented. For a beginning to the net worth statement, the Government relied entirely upon the alleged admissions of the respondent.

The admissions of respondent to the agents, particularly with reference to the item of "cash on hand" were the principal issues in the case. At the inception of the trial respondent stipulated to all items on the net worth statement except "cash on hand" and "cash in bank" (R. 8-9). Throughout the trial, respondent objected to evidence of the alleged admissions, and made appropriate motions to dismiss the indictment and to render a verdict for respondent, due to the failure of the Government to prove a case or to prove the corpus delicti by independent evidence (R. 54, 57, 62, 68, 98, 100, 107, 141, 198).

The Court of Appeals for the Ninth Circuit reversed the conviction and ordered a new trial (R. 220). The Court held that the burden of proof was on the Government as to each pertinent starting item of the net worth statement to a reasonable certainty. Since there was no independent proof of any portion of the corpus delicti, the extra-judicial written and oral statements of the respondent were not competent or admissible to establish the starting items of the net worth statements or understatement of income. The Court indicated that the admissions of the respondent as related by government agents were insufficient to establish the item of "cash on hand" anyway. Thus the prepared "net worth" statements had no valid probative value. There being no other evidence of any sort to establish "cash on hand" or to dispute the hypothesis

in favor of innocent sources of present assets, there was no evidence to support the conviction (R. 219).

SUMMARY OF ARGUMENT

1.

This is a "bare" net worth case. It represents an effort by the Government to extend the scope of prosecutions for attempted income tax evasion to new frontiers. In its zeal to enforce the revenue laws the Government is encroaching upon basic constitutional rights of citizens, and violating established principles of criminal law. It fails to recognize basic distinctions between the principles governing civil tax cases and those governing criminal cases. Apparently what the Government is now seeking is a special set of rules of criminal evidence and law to be applied to income tax prosecutions alone so that the prima facie correctness of a determination of the Commissioner of Internal Revenue will be sufficient to require a given defendant to prove his innocence. The Government here is attempting to extend to criminal cases the special rule of ordinary civil tax cases shifting the burden of proof to the taxpayer.

Some courts have expressed concern at the tendency of the Government to extend the use of the net worth method of proof. *United States v. Casserta*, 199 F. 2d 905, 907 (C. A. 3); *Demetree v. United States*, 207 F. 2d 892, 893 (C. A. 5); and *United States v. Riganto*, 121 F. Supp. 158, 159 (E. D. Va.) Basically, the Government's contention in the instant case is: mere proof of increased visible assets, without any evidence of their source as "income," is sufficient to make a prima facie case, and cast the burden of proving innocence on the citizen taxpayer.

2.

The net worth method is unreliable as a means of determining current taxable income. The form of statement generally compiled by the Government is not a true net worth statement from an accounting standpoint, but rather a statement of visible assets listed as cost owned by the taxpayer on a specific day, less known liabilities. The Government adds to its list of assets known expenditures during the year.

The net worth method is not an accurate means of determining current income. While a steadily increasing net worth over a period of years, computed from definitely established beginning assets, may justify an inference of income, it does not show definitely in which year. At best it yields only a rough approximation of what the income might be. *United States v. Riganto, supra, Thomas A. Talley v. Commissioner*, Docket Nos. 33140, 33141, 20 T. C. No. 101.

3.

The courts originally permitted the Government to use the net worth method as *corroboration* of direct evidence in cases involving lucrative illicit enterprises which kept no books or records. See *Gleckman v. United States*, 80 F. 2d 394 (C. A. 8), certiorari denied 297 U. S. 709; *Schuermann v. United States*, 174 F. 2d 397 (C. A. 8) certiorari denied 338 U. S. 831; *United States v. Johnson*, 319 U. S. 503; *Lurding v. United States*, 179 F. 2d 419 (C. A. 6). Permission to use such indirect evidence of income was justified as reinforcement of direct proof where "an elaborately concealed illegal business was involved." *United States v. Johnson, supra*, p. 518.

4.

As the Government has extended the use of this net worth method to prosecutions of taxpayers in legitimate businesses, the courts have established certain definite requirements of proof which the Government must meet in order to safeguard the rights of defendants under the rules governing the use of circumstantial evidence.

(a) Taxpayers have a right to have their taxes computed in accordance with the method of accounting used by them in preparing their returns, (I. R. C. Sec. 41) and since the net worth method is not a normal accounting method for determining annual income, the courts have held that the Government may use the net worth method, only where (1) no method of accounting was regularly employed by the taxpayer, or (2) the method employed did not clearly reflect his income. Where the taxpayer's books are adequate to reflect income there must be some external evidence of unrecorded income in order to use this method.

(b) The Government must show a source or sources of income to account for the increase in net worth. Such a source may be either (1) a definite source of income discovered by the Government and not reflected in the books or in the returns, or (2) income which, while reflected in the books, is recorded either incorrectly or with demonstrable omissions.

(c) In sustaining its burden of proof of unreported income the Government is required to establish the taxpayer's net worth at the beginning and end of each tax year to a reasonable degree of certainty. This imposes upon the Government the necessity of establishing an accu-

rate starting point. In order to justify the inference that an increase in visible assets resulted from current receipts, the Government must demonstrate that the assets and liabilities at the starting point are accurate, and that there were no other assets at that time. "Essential proof of no other assets is the cornerstone of the evidence of the government." *United States v. Fenwick*, 177 F. 2d 488, 492 (C. A. 7).

(d) After establishing an accurate starting point, the Government must then establish that any annual increases in net worth were from current taxable income. It must justify the inference that such increases came from a source of income discovered by the Government, or otherwise specifically identified, and not from non-taxable sources, such as gifts, inheritances, insurance proceeds, soldier's bonuses, etc. It cannot assume that any visible increase in net worth necessarily resulted from unreported current taxable income.

5.

There are two elements to be proven to establish the offense of attempted tax evasion (1) unreported taxable income and (2) a willful intent to evade the tax thereon. Because of the particular nature of the offense the corpus delicti encompasses the whole of it. In most criminal offenses there are two separate parts to the corpus delicti (1) that an injury occurred, such as death by homicide, and (2) that someone caused the injury. Since the failure to report taxable income is not an offense unless the failure is willful, it is not possible to prove a crime took place without establishing the guilt of the person who committed it.

6.

At the trial of this case the Government relied upon respondent's oral and written statements to internal revenue agents as the sole proof of essential elements of the offense. It tried the case on the theory that proof of annual increases in net worth were sufficient without more to establish (1) that respondent had understated his taxable income, and (2) that he willfully intended to evade the tax thereon. An agent testified that the respondent had orally admitted having only \$500 cash on hand on December 31st of each of the six years 1943 to 1948, inclusive. (Respondent contends that on cross-examination the agent admitted this was not exactly correct, so that the fact of the admission is itself in question.) Another agent offered in evidence a statement signed by the respondent admitting that his income had been understated.

The Government selected December 31, 1945 as its starting point and relied upon respondent's alleged admission that he had only \$500 cash on hand as sole proof of that item. It offered no proof at all with respect to the nature of respondent's business or his income and relied upon his written admission of understatement of income as sole proof that taxable income from any source was unreported. It did not produce his books and records in court, and conceded they were adequate to reflect his income. The agents disregarded the books solely on the basis that in their opinion he had omitted some income. They offered no independent proof at all of any income omitted from his books or returns. The Government offered no independent proof to establish the item cash on hand, or to refute the possibility that he did have cash on hand at the starting point which might have been used to purchase the visible assets seen

by the agents. On the contrary, the Government's own evidence supported respondent's testimony that he had purchased the assets they listed with funds accumulated in prior years.

7.

The court below ruled that it was error to receive in evidence respondent's oral and written admissions without some independent proof of the corpus delicti. The Government contends (1) that it did offer some independent proof of the corpus delicti, and (2) that the court below has broadened the rule requiring corroboration of admissions to include independent evidence of even a subsidiary fact.

Respondent disagrees with the Government's interpretation of the decision of the court below. That court properly held that the burden is on the Government to prove each item in the starting point to a reasonable certainty. The court further held that mere proof of an increase in visible assets was not proof of any material part of the offense charged, and was not independent proof of the corpus delicti. The Government's contention that proof of an increase in visible assets in a given year is sufficient proof of unreported taxable income, is an attempt to establish the corpus delicti by conjecture and innuendo. The Government wishes to be relieved of the burden of proving the item cash on hand and asks that the burden of proof be shifted to the taxpayer. In support of this contention it cites cases which relieved the Government of the necessity of proving a negative averment under certain special circumstances involving contraband or acts of a sinister nature.

Respondent contends that in a case such as this, involving prosecution of a legitimate businessman, based solely upon alleged increases in net worth, "proof of no other assets", including the opening item cash on hand is the cornerstone of the Government's case. Without proof of this element there can be no accurate starting point, and consequently no basis for determining any increase in net worth. Without proof of an increase in net worth there is nothing from which to infer any income, let alone the question of whether the income was from current non-taxable sources.

8.

A bare net worth case lacks any evidence from which a jury could properly draw the inference of an intent to evade a tax. In the instant case there was no evidence at all offered of any affirmative act of respondent which could be the basis of a finding of a willful attempt to evade a tax.

ARGUMENT

I.

THERE WERE NO ADMISSIONS TO AGENTS BY RESPONDENT OF CASH ON HAND AT THE BEGINNING OF ANY YEAR

At the outset the nature and content of respondent's alleged admissions should be made clear. The Government erroneously implies that the court below held that respondent admitted "that he had \$500 in cash on hand at the starting point" (Br. 12). While the prime issue in this case is whether *any* admission may be received in evidence without

independent evidence of the corpus delicti, it would be erroneous to assume that the court below accepted the Government's contention in reaching its decision.

The Government's contention that the item cash on hand on Exhibit B was based on respondent's previous oral admission is not borne out by the record (Br. 9, 10). Respondent developed on cross-examination of the Government agents that respondent had never in fact made the statement that he had only \$500 cash on hand at the beginning of each year. Respondent had no fear of the agents' testimony, and over the Government's objection demanded the notes from which agent Tucker was testifying, and offered them in evidence (Respondent's Exhibit A, R. 81). This exhibit purported to be a memorandum of an interview with respondent, prepared and signed by the agents. It stated: "On January 1, 1944 he had approximately \$500.00 in cash *in his pocket*. He believes that because it is his habit to carry that much money in his pocket at all times" (italics supplied) (R. 82).

In Exhibit 11, the affidavit of respondent prepared by the agents, the agents did not include any reference to the alleged \$500 cash on hand or in pocket at the end of each year. The only pertinent reference to cash on hand is the statement: "Excess receipts I accumulated in my safe for short periods of time and then deposited such moneys in my savings account" (R. 107-110). It is significant that in the only written statements referring to conversations with respondent there is no admission that he had only \$500 in cash on hand at the beginning of any one year. The record is clear that respondent refuted the accuracy of the net worth figures and offered Exhibit B, not as proof of the figures thereon, or as an admission of the

figures, but as physical proof of the inaccuracies of the agents' testimony (R. 80, 86, 187-190, 195). Respondent signed Exhibit B, although he did not understand the figures, solely because Verdugo said "I don't know about all the figures on it but it is a commonly used method of determining income and it looks all right to me" (R. 87, 140-141, 176-177, 187).

The direct testimony of agent Tucker that respondent admitted having *exactly* \$500 cash on hand on December 31st of each of the years 1943 to 1949, inclusive, and *exactly* \$1,971.50 on December 31, 1949 is not only highly improbable, but was completely destroyed on cross-examination by his admission:

"This item of cash in pocket, as I said before, is terminology. I didn't interpret he carried five hundred in his pocket at all times. It is obvious that he had more cash at times because his savings account shows he deposited one thousand or two thousand or more at a time, so it is evident he had it the day before he deposited it and probably for days or weeks before. Of course at times he had more cash than that." (R. 85)

Since the *only* evidence offered by the Government that respondent admitted having only \$500 cash on hand on December 31st of each year was the oral testimony of agent Tucker, it is clear that the cross-examination deprived his direct testimony of any probative value. The court below did not have to determine whether there was sufficient credible evidence of this admission, since it held that even on the Government's contention, it was inadmissible for lack of some independent evidence of the corpus delicti.

The only other alleged admission of respondent was the statement typed by agent Tucker and signed by respondent that he had understated his income (Exhibit 11, R. 109). The Government contends he made a similar extra-judicial admission to Verdugo during the investigation (R. 131-132, Br. 10). Agent Webb admitted that respondent had not made any such admission in their interviews with him, and that the first time it was said was in the statement prepared by agent Tucker (R. 126). There was no independent evidence whatsoever that any receipts were omitted from the books or income tax returns. The Government relied entirely upon the alleged admissions that income was under-stated.

II.

IN A PROSECUTION FOR INCOME TAX EVASION THE CORPUS DELICTI INCLUDES EACH OF THE ESSENTIAL ELEMENTS OF THE OFFENSE.

Although the term "corpus delicti" has been used quite generally in considering the requirements of corroboration for the receipt of admissions and confessions in evidence, there has not been complete agreement as to its definition and application to various offenses.¹

¹BOUVIER'S LAW DICTIONARY, Vol. 1, p. 686, defines "corpus delicti" as follows:

"CORPUS DELICTI. The body of the offence; the essence of the crime.

It is a general rule not to convict unless the corpus delicti can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body; Best, Pres. § 201; 1 Stark. Ev. 575. See 6 C. & P. 176; 2 Hale, P. C. 290; Whart.

In most criminal offenses there are two separate parts to the *corpus delicti*, (1) that an injury occurred, such as death by homicide, and (2) that someone caused the injury. Proof of the first element is entirely separate from proof of the second. The guilty person could be anybody, and the prosecution's task is to connect some person with the injury. But in the offense of income tax evasion, the two elements are not separable. If a tax is due, the only person who can be guilty of attempting to evade it is the person who

Cr. Ev. § 324. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence; 3 Benth. Jud. Ev. 234; Wills, Cir. Ev. 105; Best, Pres. § 204; 3 Greenl. Ev. 30. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: first, the death; and secondly, the existence of criminal agency as its cause; *Pitts v. State*, 43 Miss. 472. A like analysis would apply in the case of any other crime."

WIGMORE ON EVIDENCE, 3rd Ed., Vol. VII, Sec. 2072 states:

"§ 2072. (3) Definition of 'Corpus Delicti.' The meaning of the phrase '*corpus delicti*' has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, first, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); secondly, somebody's criminality (in contrast, e.g. to accident) as the source of the loss,—these two together involving the commission of a crime by somebody; and, thirdly, the accused's identity as the doer of this crime.

(1) Now, the term '*corpus delicti*' seems in its orthodox sense to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained:

* * *

This, too, is '*a priori*' the more natural meaning; for the contrast between the first and the other elements is what is emphasized by the rule; i.e. it warns us to be cautious in convicting,

owes it.² The offense consists of two main elements: (1) a failure to report taxable income, and (2) a willful attempt to evade the tax thereon. Since the failure to report taxable income is not an offense unless the failure is willful, it is not possible to prove a crime took place without establishing the guilt of the specific person who committed it. In other crimes, such as murder or larceny, proof that a crime was committed is independent of proof of identity of the guilty party. Thus, because of the particular nature of the offense of attempted income tax evasion, the *corpus delicti* encompasses the whole of the offense. Up to this point respondent is in agreement with the Government (Br. 28). He disagrees with the Government's illogical attempt to change the element of *unreported income* to merely *increased assets* in the *corpus delicti*. The Government assumes it can, in a prosecution based *solely* on the net worth theory of circumstantial evidence, eliminate one of the cornerstones essential in building the net worth structure. See *United States v. Fentzick*, 177 F. 2d 488, 492 (C. A. 7). Without correct assets as a starting point, it is impossible to create a "net worth" statement which indicates taxable *income*. The Government appreciates this truth, and therefore attempts to change the first element of the crime to: "(1) A failure to report an apparent gain in assets, from any source, taxable or not."

since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence—i.e. to find the second element lacking, is not the discovery against which the rule is designed to warn and protect us.

(2) But by most judges the term is made to include the second element also, i.e. somebody's criminality:"

* * *

²While others may be guilty of aiding and abetting, there can be no offense under Sec. 145(b) unless the taxpayer is also guilty.

III.

WHERE THE NET WORTH METHOD IS USED TO ESTABLISH INCOME TAX EVASION, THE GOVERNMENT MUST PROVE AS ESSENTIAL ELEMENTS (1) THAT THE TAXPAYER'S BOOKS AND RECORDS WERE NOT AVAILABLE OR WERE INADEQUATE TO DETERMINE INCOME, (2) A SOURCE OF INCOME TO ACCOUNT FOR THE INCREASE IN NET WORTH, (3) A FIXED STARTING POINT AT WHICH THE TAXPAYER'S FINANCIAL CONDITION IS AFFIRMATIVELY ESTABLISHED WITH SOME DEFINITENESS, AND (4) THAT INCREASES IN NET WORTH WERE NOT FROM NON-TAXABLE INCOME OR RECEIPTS.

In order to discuss the narrow issue of whether proof of the element of cash on hand is essential to a determination of income by the net worth method, it is first necessary to consider what are the essential elements of the offense of attempted tax evasion. The first element of the offense which the Government must prove is that there is a deficiency in tax, and that an additional tax is due for a particular year. A tax return is required for each year, and a willful attempt to evade the tax for each year is a separate offense. *United States v. Johnson*, 127 F. 2d 111, 119 (C. A. 7) Affirmed 319 U. S. 503.

The first task of the Government, therefore, is to prove the net taxable income.³ Net income may be established by direct or indirect proof.⁴ Where the direct proof method

³While the Government is not required to prove the exact amount of unreported income (*United States v. Johnson*, 319 U. S. 503, 517), it is required to prove failure to report a substantial taxable income. *United States v. Schenck*, 126 F. 2d 702, 704 (C. A. 2); *United States v. Glazer*, 110 F. Supp. 558, 562 (E. D. Mo.)

⁴See discussion by ROTHWACKS "Indirect Proof of Income" in Symposium on Procedure in Tax Fraud Cases, American Bar Association, published by Matthew Bender & Company, 1951, p. 51 et seq.

is used, the Government offers evidence of specific income not reported, or specific false deductions claimed. There the principal issue is the intent of the taxpayer. Where direct proof is not available the courts have permitted the use of three methods of proving income indirectly by circumstantial evidence, (1) bank deposits, (2) net worth increases, (3) expenditures.⁵

Where the Government has offered substantial proof that a taxpayer had a specific source of taxable income, not disclosed upon his return, and is unable to prove by direct evidence the amount of such income, use of the net worth theory has been permitted to enable it to attempt to show by circumstantial evidence that the taxpayer had substantial unreported income. Also, where the Government has offered substantial proof of specific omissions of income from the same source as is disclosed on the return but has been unable to establish the amount, the net worth theory has been permitted. The degree to which use of this theory is permitted depends to a considerable extent upon the evidence of the taxpayer's compliance with the internal revenue laws.

1. Unreliability of Net Worth Method As Proof of Income.

The courts originally permitted the Government to use the net worth method as corroboration of direct evidence

⁵The increase in numbers of cases based upon indirect proof of income has produced several discussions of court decisions involving this method of proof: Avakian, "The Net Worth Method of Establishing Fraud," *Proceedings of New York University Eleventh Annual Institute on Federal Taxation*, pp. 707-737; Rothwacks, "Indirect Proof of Income", *supra*, pp. 47-88; Balter, *Fraud Under Federal Tax Law* (2d Ed.), pp. 313-321, 415-417; Lipton, "Recent Civil Fraud Cases—Problems of Burden of Proof," *TAXES*, February 1953, p. 410; Webster, "Section 145 (b) and Prior Accumulated Funds," *TAXES*, November, 1950, p. 1065; and Burns and Rachlin, "How to Defend Net Worth Cases," *TAXES*, July 4, 1954, p. 537.

in cases involving lucrative illicit enterprises which kept no books or records. See *Gleckman v. United States*, 80 F. 2d 394 (C.A. 8), certiorari denied 297 U. S. 709; *Schuermann v. United States*, 174 F. 2d 397 (C. A. 8) certiorari denied 338 U. S. 831; *United States v. Johnson*, 319 U. S. 503; *Lurding v. United States*, 179 F. 2d 419 (C. A. 6).⁶ The Government has gradually been extending the use of the net worth method and using less and less direct evidence. The unreliability of this indirect method of proof has been recognized by some courts.

The kind of net worth statement used by the Government is not a true "net worth" statement from the accounting standpoint, but rather a statement of visible assets, listed at cost, owned by the taxpayer on a specific day, less known liabilities. The Government adds to its list of assets known expenditures during the year, such as insurance premiums, contributions, taxes paid, and an estimate for living expenses. The statement should deduct any non-taxable income, non-taxable portion of capital gains, inheritances, gifts, etc. It cannot list assets at present value, since neither depreciation nor appreciation in value involve expenditure of funds of a taxpayer.

The net worth method may sound like a fairly definite method for ascertaining increases in income, but it has many complications. Its first weakness is that it is not an accurate method of reflecting annual income. Over a period of

⁶As Judge Yankwich recently stated in *United States v. Wilbur I. Clark*, So. Dist. Cal. decided August 4, 1954, unofficially reported 1954 CCH para. 9546:

"A study of the cases will reveal the fact that the use of this method was sanctioned because it related to illegal activities by persons, who, because of the nature of their business, could not and would not keep books adequately reflecting their income."

several years, a steadily increasing net worth may justify an inference of income, but it equally justifies an inference of expended cash or conversion of previously held assets. The Government rarely has the complete proof necessary for an accurate statement, and usually relies upon assumptions and incomplete proof. For example, if a taxpayer is known to have owned \$100,000 in securities on January 1 and not on December 31 of the same year, the Government cannot know whether his net worth decreased without ascertaining what happened to the proceeds. If the taxpayer sold the securities for \$200,000, kept the entire \$200,000 in a vault until the following year and then purchased \$200,000 worth of new securities, the Government would erroneously assume this reflected at least \$100,000 of new income in the year of purchase. It might correctly assume the amount of gain, but place it in the wrong year.

The Court of Appeals for the Fifth Circuit has expressed the growing concern of the courts at the Government's extension of the net worth method. In *Demetree v. United States*, 207 F. 2d 892, 893, the Fifth Circuit said:

"This is another of the growing list of criminal cases in which the government, having no or little direct evidence of defendant's guilt to offer and endeavoring to prove it by circumstantial evidence, attempts to do so by what may be called the net worth and expenditures method of proof. In this attempt, unless the greatest care is taken by the district judge to prevent it, there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendant's income to take the place of proof of it."

Chief Judge Hutcheson of the Eastern District of Virginia recently stated in *United States v. Riganto*, 121 F. Supp. 158, 159 (E. D. Va.):

" . . . In the last few years I have observed with interest a change that has taken place in the nature of proof offered to support the charge of the prosecution in many of these cases charging tax fraud. This change has caused me some concern by what appears to be a preference to introduce proof to show understatement of income and fraudulent intent by methods other than by direct evidence. Of course, it is necessary in some cases that the Government proceed by indirect methods. This evidence consists of proof undertaking to show income of the taxpayer computed upon what is referred to as the net worth increase or bank deposits and expenditures methods or a combination of both. The latter is employed here. Basing my observation upon a number of cases during the past few years, it would seem that the use of one or both of these methods has been employed through preference at times when direct evidence is available."

In civil cases the Tax Court has also questioned the reliability of the net worth method as a means of determining income. In *Thomas A. Talley v. Commissioner*, Docket Nos. 33,140 and 33,141 20 T. C. No. 101, the Tax Court said:

"The limitations of the increase in net worth method are well known. Often it results in an inaccurate statement of income or the placing of income in the wrong year and, at best, it yields only an approximation."

2. Adequacy of Books and Records.

Where a taxpayer has kept regular books and records, and has filed required returns, the Commissioner is required by law in the first instance to compute his tax in accordance with the method of accounting adopted by the taxpayer. The only authority the courts have cited for the use of the net worth method in either civil or criminal cases is I. R. C. Section 41 (1939 ed.).⁷ This section authorized the Com-

⁷*Jelaza v. United States*, 179 F. 2d 202 (C. A. 4); *Lurding v. United States*, 179 F. 2d 419 (C. A. 6); *Buttermore v. United States*, 180 F. 2d 853 (C. A. 6); *Pollock v. United States*, 202 F. 2d 281 (C. A. 5), certiorari denied 345 U. S. 993 (1953); *Remner v. United States*, 205 F. 2d 277 (C. A. 9), remanded for rehearing, 347 U. S. 227; *United States v. Casserta*, 199 F. 2d 905 (C. A. 3); *James Q. Whittemore v. Commissioner*, CCH Dec. 16, 700 (M), 7 TCM 845; *Ameen Jacob v. Commissioner*, CCH Dec. 17, 664 (M), 9 TCM 415; *Murray Glackman v. Commissioner*, CCH Dec. 18, 692 (M), 10 TCM 1132; *Thomas A. Talley v. Commissioner*, CCH Dec. 19, 778, 20 TC, No. 101; *Booker W. Evans v. Commissioner*, CCH Dec. 20, 065 (M), 12 TCM 1470; Rothwacks, article cited at footnote 4, at p. 52.

Thus the Court of Appeals for the Ninth Circuit, in *Remner v. United States*, *supra* p. 280, 286, stated expressly that:

"The net worth method of computing income may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income."

In *Sasser v. United States*, 208 F. 2d 535, 537 (C. A. 5) the court stated:

"... The net worth method of reconstructing taxable income in cases where the taxpayer has no records from which his actual income may be computed is a hybrid method of determining income based upon the cost of assets owned by the taxpayer at the beginning and at the end of each taxable period."

In *United States v. Williams*, 208 F. 2d 437, 438 (C. A. 3), the court stated:

"... The defendant contends that his is not a proper case for the application of the net worth formula for proving tax evasion. In this he is wrong. The statute [I. R. C. § 41] provides that if the taxpayer has no regular method of accounting 'the computation shall be made in accordance with such method as

missioner to use a method different from the taxpayer's only where (1) no method of accounting has been regularly employed or (2) the method employed does not clearly reflect the income. Whether the net worth method be considered as a "method of accounting" or a "method of reconstruction of income" is immaterial, as Section 41 provides that the net income of a taxpayer "shall be computed" in accordance with the method of accounting regularly employed by him in keeping his books.⁸

in the opinion of the Commissioner does clearly reflect the income'."

In *Bell v. United States*, 185 F. 2d 302, 308 (C. A. 4), certiorari denied 340 U. S. 930, the court stated:

"... An estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under the statute to make and to preserve . . ."

In *Garipey v. United States*, 189 F. 2d 459, 461, (C. A. 6), it was stated:

"... When investigation was begun by agents of the Treasury, they were unable to find adequate records disclosing receipts of income by the appellant. The investigators then undertook to establish his income by the so-called 'net worth' method."

It is interesting to note that in *United States v. Friedberg*, D. C. Ohio, unofficially reported 53-2 USTC, Par. 9631, affirmed 267 F. 2d 777 (C. A. 6), certiorari granted 347 U. S. 1006, No. 18 this Term, the trial court instructed the jury as follows:

"In this case the government is trying to establish an additional tax owing by a method known as the net worth method, which method is authorized where the bookkeeping methods of the defendant do not clearly reflect the income of the defendant. If you find that the taxpayer's bookkeeping methods do clearly reflect his income, then the government has no right to use the so called net worth method and your verdict must be for the defendant in this case as to all counts of the indictment."

⁸It has recently been pointed out to this Court that the true tax liability is such a controversial question that an official determination of the Commissioner that a tax is due should be a prerequisite to a charge of an attempt to evade a tax. (Brief of Petitioner, *Remmer v. United States*, *supra*, p. 23). It was further argued that use of the net worth method in determining taxable income requires a finding

The use of the net worth method in civil tax fraud cases has been discussed many times in the Tax Court. The limitations upon its use were stated clearly in *Thomas A. Talley v. Commissioner*, *supra*:

"The ordinary method of computing taxable income in accordance with the general pattern of the Code is to subtract allowable deductions from a taxpayer's gross income. The increase in net worth method is, of course, not in accord with this statutory pattern and is permitted by virtue of section 41, I. R. C., only in unusual circumstances, none of which is present here.

"Section 41 provides that 'net income shall be computed . . . in accordance with the method of accounting regularly employed in keeping the books' of the taxpayer. The Commissioner's authority under section 41 to compute the income 'in accordance with such method as in the opinion of the Commissioner does clearly reflect the income' exists only if no method of accounting has been regularly employed in keeping the books of the taxpayer, or 'if the method employed does not clearly reflect the income'. See Regulations 111, sections 29.41-1 and 29.41-2."

Where books are adequate to reflect income there must be some external evidence of unrecorded income, in order to use this method. There is no prescribed detail as to just what books or how many must be kept.⁹ The books must be produced in court, so that the court may determine their adequacy. Here none of the respondent's books or records

by the Commissioner that the taxpayer's books and records were inadequate under Section 41, and that so important a decision is not left to a subordinate agent, or to the prosecutor alone (*id.* p. 23-26). While these points were not specifically raised in the instant case, they are issues which are present in every tax evasion case.

⁹*Bechelli v. Hofferbert*, 111 F. Supp. 631, 632 (D. C. Md.); *Ameen Jacob v. Commissioner*, *supra*, cited at footnote 7.

was produced in court, and the Government made no claim that they were inadequate. Agent Tucker claimed the books were adequate, but "there were lots of things left out" (R. 89). However, the Government offered no proof of any income left out, other than the speculative inference it asked be drawn from the alleged increase in net worth.

3. Source of Income.

The second element of the offense in a net worth case is proof of a source or sources of income to account for the increase in net worth. The income tax law does not apply to all assets received by a taxpayer during a tax year. For example, gifts may be in the form of cash or other assets, but such assets are not subject to the income tax law. There are other categories of receipts and assets which do not constitute taxable income, such as interest on tax-exempt bonds, inheritances, non-taxable portion of capital gains, recoveries in lawsuits, proceeds of insurance, soldier's bonus, etc.

A "possible" source of income must be either (1) a definite source of income not reflected in the books or on the return or (2) income which, while reflected in the books, is recorded either incorrectly or with demonstrable omissions. The Government must show some connection between a definite source of income and the increase in net worth.

In some cases the Government has proved a specific source of income by showing that the defendants were wholly or partially engaged in gambling activities, and that they kept incomplete books and records, or no records at all¹⁰. In

¹⁰*Schuermann v. United States, supra*; *United States v. Johnson, supra*; *United States v. Potson*, 171 F. 2d 495 (C. A. 7); *United States v. Vassallo*, 181 F. 2d 1006 (C. A. 3); *Lurding v. United States, supra*; *United States v. Skidmore*, 123 F. 2d 604 (C. A. 7), cert. den. 315 U. S. 800.

other cases there was specific evidence of a source, accompanied by acts of concealment or deception which justified the inference.¹¹

It is clear that the mere increase in assets or net worth does not justify the assumption that the increase is from taxable income. At least in a criminal case, if not also in a civil case, it is just as reasonable to assume the increase was from non-taxable sources.

In United States v. Smith, 206 F. 2d 905, 911 (C.A. 3), the court stated:

“ . . . We think it part of the Government’s prima facie case to establish, at least, that what it charges against defendant is income for the year involved. It has not established its prima facie case by showing that defendant has some money and then asking the jury to infer that that money is ‘income’ for the year involved.”

4. Starting Point.

When the Government finds resort to the net worth method necessary because it has discovered a taxpayer has specific unreported income, and his books and records were not adequate to enable it to determine his correct income, it has the difficult task of computing his net worth at the beginning and end of each tax year under investigation. It is difficult because taxpayers are not required by the revenue laws or regulations to keep such records. As the Government usually goes back many years to find a starting point, evidence is not always available to establish with accuracy

¹¹*Bell v. United States*, 185 F. 2d 302 (C. A. 4), certiorari denied 340 U. S. 930; *Gendleman v. United States*, 191 F. 2d 993 (C. A. 9); *Davena v. United States*, 198 F. 2d 230 (C. A. 9), certiorari denied 344 U. S. 878; *Mitchell v. United States*, 208 F. 2d 854 (C. A. 8).

the correct assets and liabilities of a taxpayer at any given time. Even when properly established, a net worth statement is still only circumstantial evidence.

Since the Government *has chosen* to ascertain and compute the taxpayer's assets, the burden is upon it to do so to a reasonable degree of certainty. It cannot assume that whatever assets a revenue agent discovers represent all of taxpayer's assets. The net worth starting point must be accurately established, otherwise assets acquired or expenditures made during the tax years involved may be attributed to other funds or assets which were acquired prior to the starting point and not listed by the agent. The Government's problem was stated by the Court of Appeals for the Fifth Circuit in *Ford v. United States*, 210 F. 2d 313, 315 as follows:

" . . . One of the most difficult matters of proof in such cases is to establish a satisfactory starting point at the beginning of the first of the tax periods included in the indictment, that is as applied to the present case, to negative the existence on January 1, 1945, of resources available to the defendant and his wife from which the excessive expenditures might have come. The Government then has the further burden in such cases of proving that there were no gifts, devises, or other non-taxable income which could have been used for the expenditures, and of proving large cash expenditures within each of the tax years considerably exceeding the taxpayer's accumulated cash resources plus reported income and which expenditures could not be otherwise accounted for than by finding that the taxpayer had received more taxable income than had been reported, and had willfully and knowingly filed or caused to be filed a false and fraudulent income tax return."

The burden which the Government must sustain in proving the starting point in a net worth case was set forth in the charge of the District Court in *United States v. David Friedberg*, D. C. Ohio, unofficially reported 53-2 USTC, Par. 9631 affirmed 207 F. 2d 777, (C. A. 6) certiorari granted 347 U. S. 1006, No. 18, this Term, where the court said:

"A clear, concise and reasonably accurate determination of the net worth of the taxpayer at the start of of the taxable period, a source of income during the period, and an increased net worth at the end of the period which increase exceeds reported income, and established personal expenditures during the period, are necessary circumstances which must be proved beyond a reasonable doubt before the element of additional tax owing may be established by the net worth method." (italics supplied)

In *United States v. Fenwick*, *supra*, a conviction was reversed because the Government failed to exclude the availability of cash on hand from certain possible sources at the beginning date of the net worth computation. The court stated, p. 492;

"Remembering that the Government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the Government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence

beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the Government's computation of net worth, it follows that its computations can not be relied on. *Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt.*" (italics supplied)

A similar holding was made in *Bryan v. United States*, 175 F. 2d 223 (C. A. 5), affirmed on other grounds 338 U. S. 552, in which a conviction was reversed on the ground that a prima facie case on the net worth expenditure basis had not been made out, since the Government's proof did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.

5. Current Taxable Income.

Where the Government succeeds in establishing an accurate net worth starting point, it must then prove that the annual increases in net worth were from *current taxable* income. It must justify the inference that such increases came from a source of income discovered by the Government, and not from non-taxable sources, such as gifts, inheritances, insurance proceeds, soldier's bonus, etc. It cannot simply *assume* that any *visible* increase in net worth necessarily resulted from unreported *current* taxable income.

As the Court of Appeals for the Ninth Circuit said in *Remmer v. United States*, 205 F. 2d 277, judgment vacated and remanded, 347 U. S. 227, at p. 280:

"The Government's case is based upon the net worth method, the underlying theory of which is that

where a person's net worth at the end of a particular year is greater than his net worth at the beginning of that year, and such increment is not attributable to gifts, devises, loans, or other non-income sources, an inference may be drawn that the increase in net worth represents income to the taxpayer."

The same Court said in *Olender v. United States*, 210 F. 2d 795, 798 (C. A. 9):

"... This method of proof requires the government to show the net worth of the taxpayer as of the beginning and the end of the taxable year and the non-deductible expenditures made by him that year. If the increase in his net worth plus his non-deductible expenditures exceed his reported income for the year, *and such excess is not attributable to gifts, devises, loans or other non-taxable receipts*, then the conclusion may be drawn that the taxpayer realized income which he failed to report . . ." (italics supplied)

The Court of Appeals for the Third Circuit said in *United States v. Casserta*, 199 F. 2d 905, 907:

"... Of course it is necessary, so far as possible, *to negative non-taxable receipts by the taxpayer* during the period in question. The cases show, however, a rather surprising rule that when the discrepancy between increased net worth and reported income is shown, the burden of explanation shifts to the taxpayer, at the same time repeating the usual criminal law rule that the burden throughout a criminal case is upon the prosecution. We do not, however, get into this particular ramification in the case under discussion, for the prosecutor offered proof *negating receipts for non-taxable sources such as gifts, inheritances and so on.*" (italics supplied)

IV.

IN NET WORTH CASES CASH ON HAND IS AN ESSENTIAL ELEMENT WHICH THE GOVERNMENT MUST PROVE TO A REASONABLE CERTAINTY.

The entire basis of the Government's argument is that the amount of cash on hand at the starting point is not an element of the corpus delicti of attempted tax evasion, and, therefore, the Government is not required to prove it at all (Br. 13, 28). Respondent agrees that the elements of the offense are (1) unreported taxable income and (2) willful intent to evade that tax. He disagrees with the Government's contention that net income can be established under the net worth theory without proving each pertinent starting item to a reasonable certainty. The amount of cash on hand is a necessary element of proof, although not an element of the crime itself. Failure of the Government to establish cash on hand destroys the net worth theory for the establishment of unreported taxable income, and results in a complete failure of proof in the Government's case.

The Government contends that the amount of cash on hand at the starting point is not "uniformly necessary to prove that the offense has been committed—i.e., to prove the corpus delicti" (Br. 14, 28). It cites no authority for its statement. The very next sentence in its brief shows its fallacy (Br. 28). It concedes that the amounts of cash in the taxpayer's hands at the beginning and end of the year are relevant in proving an increase in net worth, which is in turn relevant to the ultimate fact of understatement of net income. This is equivalent to admitting that proof of cash on hand is a *necessary element of proof* in the instant case.

This is a *bare* net worth case, and the only evidence of additional income offered by the Government was the alleged increase in net worth. It was required to prove to a reasonable certainty *all* of the respondent's assets and liabilities at the beginning and end of each tax year under indictment.

The Government has shifted from the position it took in its petition asking for a writ of certiorari. There it said "The use of the net worth method of proof * * * depends upon the establishment of a starting point, at the beginning of the tax period involved, at which all of the defendant's known assets are computed. *An essential item of such computation is, of course, the amount of cash which the defendant had on hand at the time.* Ordinarily, this amount rests within the private knowledge of the defendant, and any effort by the Government to prove the exact amount involves inherent difficulty" (italics supplied) (Pet. 6-7).

Why did the Government contend that the decision below was "a substantial obstacle to the effective enforcement of the provisions of the internal revenue laws proscribing fraudulent tax evasion" (Pet. 7) unless the Government at that time felt it had the burden of proving cash on hand? If cash on hand is not an essential element of net worth which must be proven in order to make the assumption that any increase is current taxable income, it is of no importance to the Government whether or not the taxpayer makes any admissions.

The Government's argument has a void with respect to just where the asset "cash on hand" fits into a net worth computation. On the one hand, it contends that cash on hand is not an element of the offense, and really is of no significance (Br. 13, 19, 28), but on the other hand it strongly urges that the alleged admission by respondent of only \$500 cash on hand clinches its case (Br. 16, 37).

The net worth can be determined only by computing *all* of the assets and liabilities of a taxpayer at the beginning and end of the tax year. Until the Government can demonstrate to a reasonable degree of certainty that it has listed all of the assets and liabilities, there is no basis for determining whether there has been an increase or decrease in net worth. The net worth statement cannot be considered complete just because a revenue agent contends it lists all the assets he could "find". The proof must show that the nature of his investigation was so thorough as to justify the reasonable inference that there could be no other assets.

Since the Government contends that any increase in net worth at the end of a year over net worth at the beginning of a year is due to unreported taxable income, it must not only show a definite possible source of such alleged income, but has the burden of proving the increase was not from non-taxable sources. It is just as reasonable to infer that visible increases in net worth were from gifts, inheritances or non-taxable income, as from unidentified taxable income.

Aside from non-taxable receipts during a particular tax year, it is normal and usual for every taxpayer to have cash and securities either on hand or in a safe. Accordingly, the net worth statement cannot be complete without reflecting the amount of cash, securities or other assets on hand or in a safe at the beginning of the tax period.

It is therefore essential that the Government establish to a reasonable degree of certainty that a taxpayer had no other assets on hand than those shown on its computation at the beginning of the tax period. The Government cannot reach the point of determining the net worth, until it has established to a reasonable degree of certainty either the amount of cash on hand, or the lack of sufficient cash

on hand to account for the demonstrated increase in visible assets during the tax year, not attributable to other non-taxable sources, such as gifts.

Since the item of cash on hand must be proven in order to establish net worth, it follows that where the Government bases its allegation of unreported taxable income *solely* upon an increase in net worth, the item cash on hand is an essential element of proof of unreported net income. The Government itself contends that unreported net income is one of the elements of the *corpus delicti*.

The weakness of the Government's argument is apparent when it is recognized that to prove one of the elements of the offense—unreported taxable income—by circumstantial evidence, it must build one stone upon another and request that inferences be drawn which must be reasonable. These building stones are (1) an accurate list of assets and liabilities at the starting point, (2) an accurate list of assets and liabilities at the end of the period which clearly establishes an increase in net worth, and (3) that such increase was not due to current non-taxable receipts. The Government contends that by merely showing *a list of assets* at the end of the tax year which is greater than a list of assets it showed at the beginning, it has proven the receipt of taxable income, and has shown "independent" proof of the *corpus delicti* (Br. 15). The court below correctly pointed out that "Absent such a starting item as, say, cash on hand, the remainder of the statement proves nothing" (R. 218). Where the Government fails to establish to a reasonable certainty *each* pertinent starting item of the net worth statement, including cash on hand, securities in safe, and all other assets, it has not proven the very first step on the way toward proving an offense. Cash on hand, there-

fore, is an essential element of proof to establish net worth, which in turn is the basis for determining taxable income, and unreported taxable income is an element of the corpus delicti. There can be no building without a cornerstone, and there is no chain where a link is missing.

To argue as the Government does, that cash on hand is not an element of the offense of tax evasion, is merely a play on words (Br. 28). In the instant case, based solely on net worth, cash on hand *was* an essential element of the offense. In this respect, the Government disagrees with the testimony of its agent, cited by the court below. The agent testified that "if the Cash on Hand item as it appears in your Net Worth Statement is in error then the whole thing is in error." * * * "The total taxes, the total amounts Mr. Calderon is to be charged with would be wrong all the way through." (R. 79, 219)

The reason the Government now will not admit that cash on hand is a necessary element of proof to give probative value to a net worth statement is clearly stated in the Government's Petition for Rehearing, filed in the Court below (Pet. Br. for Rehearing p. 9) where it made the direct assertion:

"In short, visible increases in a man's wealth, beyond his reported income, clearly has probative force even though the Government presents no evidence to preclude the existence of an accumulation of cash at the starting point."

This same contention, though not clearly expressed is the sole basis for the Government's brief in this case. Perhaps the Government cannot now be expected to admit the fundamental facts of accounting theory which require a

definite asset starting point for a net worth statement. It will even less admit that proof of cash on hand is necessary to meet the reasonable requirements of the circumstantial evidence rule.

In the same Petition for Rehearing below it contended, p. 5: "* * * the item of cash on hand * * * must almost of necessity be established in many instances by the admissions of the taxpayer. * * * This Court's ruling would put an almost insuperable burden of proof on the Government by denying reliance on the exclusive source of accurate proof, i. e., the defendant's admissions."

In its petition for a writ of certiorari the Government contended "that the existence and amount of cash on hand are peculiarly within the knowledge of the defendant, and that *his failure* to present such evidence should not overcome an otherwise convincing showing of understatement of income," and cited cases (*italics supplied*) (Pet. 9, 10).

But inherent in the Government's argument is the contention, previously made openly, but now concealed behind other arguments, that the burden of proving cash on hand should be on the taxpayer. It states that in net worth cases defendants usually contend they had a hidden cache, and that the Government should not be required to prove a negative averment (Br. 36, 37).

This insistence that the exclusive source of proof is the taxpayer's admissions is tantamount to contending a defendant should be forced to incriminate himself. The reference to cases with respect to proof of a negative averment is further indication of the Government's position (Br. 37). The cases cited are not relevant to income tax prosecutions. *Rossi v. United States*, 289 U. S. 89 held that the Government was not required to prove a still was unregistered,

where it was unlawful to possess one, and the defendant could have easily shown a bond if he had one. *United States v. Fleischman*, 339 U. S. 349, dealt with failure to obey a lawfully issued subpoena. *Cascy v. United States*, 276 U. S. 413, and *Yee Hem v. United States*, 268 U. S. 178, dealt with narcotics. The principle of all these cases is summed up in *Morrison v. California*, 291 U. S. 82, 90, where this Court said: "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance * * *."

In answer to the Government's contention that "the item of cash * * * must of necessity be established by the admissions of the taxpayer" respondent cites the decision of this Court in *Tot v. United States*, 319 U. S. 463, 469-470:

"Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

* * *

"... It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by

arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation."

The negative averment cases cited above are limited to special circumstances and their principle is not applicable to all the taxpayers in the country. Almost every adult in the country has some income tax liability, and there is nothing sinister or in the nature of contraband in having cash on hand.

The argument that the Government should not be required to prove cash on hand implies that this is the only kind of asset which is difficult to find. But any taxpayer may have many assets which a revenue agent can not readily find, such as cash, securities, precious stones, coins, stamps, etc. or even large assets. If he converts any asset into cash, without realizing a gain or loss, the conversion is not a transaction which must be reported on his income tax returns. Any cash so realized could be used to acquire other assets which the revenue agents may find. If the Government is not to be permitted to set up *any* list of assets a revenue agent chooses to prepare, and call it a "net worth" statement it must be required to prove to a reasonable degree of certainty that it has accounted for *all* of a taxpayer's assets, including cash on hand (See *Kirsch v. U. S.*, 174 F. 2d 595 (C. A. 8)).

It is quite a normal human experience to save cash, either at home or in safe deposit boxes. The Government is so ready to assume that any increase in visible assets *must* have been purchased with current taxable income, that it characterizes all secret savings as caches of "hidden treasure" (Br. 36). But experience has shown so many instances of such "hidden treasure" that the probability a given taxpayer did have secret savings is just as fair as

inference as that he did not. In *David Friedberg v. United States*, *supra* No. 18 of this Term, the Government concedes that when the agents made their investigation the taxpayer had in a safe deposit box assets worth \$73,225, of which \$53,625 was in bonds and \$19,600 in currency (see Brief of the United States in Opposition, p. 7). The newspapers often carry news of incidents involving caches of hidden treasure.¹²

The necessity for proving a negative is the result of the Government's own action and not that of the taxpayer. In charging attempted tax evasion, the Government makes the positive assertion that a taxpayer has failed to correctly report his income. Where there is some direct evidence of unreported income, but not in definite amounts, it may use evidence of increase in net worth or expendi-

¹²New York Times:

March 2, 1952 (p. 33 Col. 2)—L. V. Redfield robbed in Reno, Nevada of an estimated \$2,500,000—more than \$300,000 in cash.

March 24, 1952 (p. 17 col. 3)—Mrs. Helen M. Bidden, robbed of \$125,000 in cash in Reading, Pa., that she had "not gotten around" to banking.

February 8, 1954 (p. 15 col. 7)—86 yr. old woman beaten in attempt to get \$500,000 in her safe—\$291,800 of it in cash.

March 16, 1954 (p. 30 Col. 3)—Husband absconds with \$303,000—\$243,500 in cash kept in trunk of new Cadillac.

In cases reported in Tax Court decisions large amounts of cash and securities have in fact been found. In *James Q. Whittemore v. Commissioner*, CCH Dec. 16, 700 (M), 7 TCM 845, the revenue agent found in the taxpayer's lock boxes \$32,000 in cash, \$21,000 in government bonds, and \$25,550 in cashiers' checks, a total of \$78,550. In *Estate of Maurice J. Lydon v. Commissioner*, CCH Dec. 19, 306 (M), 11 TCM 1119, the taxpayer's safe deposit box was found to contain \$32,183.25 in cash. In *Maurice A. Spalding v. Commissioner*, CCH Dec. 19, 832 (M), 12 TCM 883, the Tax Court sustained a doctor's claim that he had \$75,000 in cash at the beginning of the net worth period, and overruled the deficiency as well as the fraud penalty. In *Estate of Halley Tarr v. Commissioner*, CCH Dec. 19, 326 (M), 11 TCM 1151, the taxpayer had \$39,200 in cash.

tures to "reinforce" the direct proof. *United States v. Johnson, supra*, p. 517. But where the Government relies on increases in net worth alone as evidence of taxable income, it assumes all the burdens of so proving. When it asks the jury to infer that the increase was not only from taxable income, but from current income of that particular year, it must offer sufficient evidence to overcome the equally justifiable inference that the increase was from non-taxable sources. By choosing to prosecute cases where it has no direct proof, the Government assumes the burden inherent in circumstantial evidence cases. The *Johnson* case does *not* support the Government's claim that discrepancies between income reported and an increase in net worth (with or without proof of cash on hand) are *alone* substantial evidence supporting an inference that respondent had unreported income.

The Government has succeeded in convincing a few courts to adopt its negative averment theory, and shift to the defendant the burden of proving his innocence. *Jelaza v. United States*, 179 F. 2d 202 (C. A. 4); *Bell v. United States*, 185 F. 2d 302 (C. A. 4) certiorari denied 340 U. S. 930; *Smith v. United States*, 210 F. 2d 496, 500 (C. A. 1), No. 52 of this Term. However, this breach of one of the cardinal rules of criminal law has been deprecated by other courts. In *Demetree v. United States, supra*, p. 494, the Fifth Circuit said:

" . . . Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a *prima facie* case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and

credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, conjectures, and conclusions which the government has been allowed to get into the record, upon the apparent theory that it is up to the defendant to explain all of it away as part of his burden to prove his innocence."

and, *United States v. Casserta*, *supra*, p. 907, the Third Circuit said:

"... The cases show, however, a rather surprising rule that when the discrepancy between increased net worth and reported income is shown the burden of explanation shifts to the taxpayer, at the same time repeating the usual criminal law rule that the burden throughout a criminal case is upon the prosecution."

The unfairness of the Government's contention was pointed out in *United States v. Clark*, S. D. Cal. Aug. 4, 1954 unofficially reported 1954 C. C. H. para. 9546, where the court said:

"* * * What arose out of a special situation in cases where no adequate books have been kept is now so commonly used that there is danger that a prosecution for a serious felony may be based entirely upon disagreement as to bookkeeping methods. And the burden of proof may be shifted entirely on the taxpayer to explain not some items concealed by failure to keep books, but items which books kept in the regular course of business and of the type sanctioned by reputable accountants for a particular business may not reflect."

In spite of the many cases cited by the Government in support of its other points, it does not cite a single one to support its claim that proof of cash on hand is not essential proof of an element of the offense. If the Government's claim were upheld, all it would have to do is have its revenue agents prepare lists of assets owned by taxpayers at the beginning and end of each year. Wherever there was a substantial difference between any increase in the list of assets and the reported income, the difference would be assumed to be current taxable income upon which the taxpayers attempted to evade the tax. It would have the cases go to the jury unless the taxpayers disprove the assumption that the increase represented taxable income.

In requesting this Court to make such a rule, the Department of Justice is seeking to establish for criminal cases less of a burden of proof than the Commissioner of Internal Revenue has been required to bear in sustaining fraud penalties in civil cases in the Tax Court. That court has often upheld the assertion of a deficiency but overruled the fraud penalty on the ground that the Commissioner had not sustained the burden of proof, whereas the presumption in favor of the ordinary deficiency had not been overcome by the taxpayer.¹³

¹³In *Bonnie G. Gray v. Commissioner*, 11 TCM 1213, the Tax Court accepted the Commissioner's contention of omitted income, but held he had not sustained the burden of proof of fraud for the years 1942 and 1944, although the taxpayer had pleaded guilty to income tax evasion for 1943, which year was not before the Tax Court. To the same effect, see *Estate of Maurice J. Lydon v. Commissioner*, 11 TCM 1119.

In *A. C. Muldoon v. Commissioner*, CCH Dec. 19, 841 (M) 12 TCM 897, the Tax Court said:

"The respondent determined a fifty per cent addition to tax against each taxpayer for each of the four years. This addition is imposed by section 293 (b) of the Internal Revenue

V.

THE COURT BELOW PROPERLY HELD THAT THE GOVERNMENT HAD NOT PROVEN THE CORPUS DELICTI BY INDEPENDENT EVIDENCE.

The Court below stated that the question for decision was whether respondent's admissions "were properly received in evidence absent any independent evidence of the crime of tax evasion." (R. 218) After considering the record, it held that in the absence of some independent proof of the corpus delicti, respondent's verbal and written extrajudicial admissions were erroneously received in evidence (R. 219).

The Government offered *no evidence at all* to establish by the net worth method the following essential elements of the offense of attempted tax evasion: (1) that respondent's books and records were inadequate to properly reflect his income, (2) that respondent had a source of income not

Code where any part of the deficiency is due to fraud with intent to evade tax. The burden is upon the respondent to prove fraud. Section 1112, Internal Revenue Code. We do not find affirmative evidence sufficient to sustain this burden. Although we do not accept the taxpayers' story of the vast amount of cash brought to Alaska, and conclude that they have failed to prove that their apparent increase in net worth did not represent unreported income, this negative conclusion is not enough to sustain the additions to tax for fraud. The mere fact of a large understatement of income is not enough. *James Nicholson*, 32 B. T. A. 977 (1935) [Dec. 9024] aff'd 90 Fed. (2d) 978 (C. A. 6, 1937) [37-2 USTC par 9397]. There is no revealed source of the unreported income, nor is there evidence of gambling or other illegal activity of the affirmative nature required to establish fraud. The violation of price ceiling laws indicated by Agent Fleet's report is not sufficient. We are unable to affirm the additions to tax for fraud."

See also *Julius M. Hooper v. Commissioner*, CCH Dec. 19, 874 (M) 12 TCM 1017.

disclosed by his books and records and not disclosed on his return, or (3) specific omissions of income from the source disclosed on his books and return, (4) an intent to evade taxes.

The Government offered no *independent* evidence, and relied solely upon respondent's admissions to establish: (5) that he was in any business at all and received any income at all, (6) the cash on hand at the beginning and end of each tax year, (7) that respondent had no other assets on December 31, 1945 than those he allegedly admitted, (8) that respondent had no other non-taxable receipts or income during the tax years involved, such as gifts, inheritances, insurance proceeds, etc.

The Government contends there are two different versions of the rule requiring that a confession must be corroborated by independent evidence of the corpus delicti. It states that the Court of Appeals for the District of Columbia follows the rule that there must be "independent of the confession, substantial evidence of the corpus delicti and the whole thereof". *Forte v. United States*, 94 F. 2d 236, 240, affirmed on other issues 302 U. S. 220. However, it contends that the majority of the courts follow the less stringent version of the rule of *Daeche v. United States*, 250 Fed. 566, 572 (C. A. 2) that it is unnecessary that the independent evidence alone be sufficient to prove the corpus delicti or that it touch all elements of the corpus delicti (Br. 23-26).

Although the Government erroneously conceived the elements of the corpus delicti of a net worth case, it contends that even under the *Forte* rule, there was corroboration here. However, respondent contends, that when the elements of the corpus delicti in a net worth case are properly conceived, there was no corroboration even under the *Daeche* rule.

The Government questions the wisdom of the rule requiring the same corroboration for extra-judicial admissions as for confessions, but accepts the rule here, and claims the court below erroneously expanded it (Br. 22-23).

It is difficult to understand why the Government went into this discussion about two different rules as to the kind of corroboration needed. There is no question but that the court below followed the rule of the *Dacche* case for which the Government is now contending. The court below, in *Davena v. United States*, 198 F. 2d 230, 231, certiorari denied 344 U. S. 878, speaking through Chief Judge Denman, who wrote the opinion in the instant case, stated:

"... in this circuit * * * it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by the preponderance of proof."

See also *D'Aquino v. United States*, 192 F. 2d 338, 357 (C. A. 9).

The only apparent reason why the Government devoted so much of its brief to a discussion of rules (Br. 20-31) which were not questioned by the court below, is a desire to avoid defending its real position. The "Question Presented" in the Government's brief on the merits (Br. 2) is *entirely different from* the "Question Presented" in its petition for a writ of certiorari (Pet. 2). There is a tremendous difference between asking whether a defendant's admissions as to cash on hand "require corroboration", or must be corroborated by "independent evidence of this fact." The court below did NOT hold that any single fact in respondent's extra-judicial admissions must be corroborated by independent evidence of that single fact. It did hold that a mere "list of assets", without any other evidence tending to establish

the commission of the crime of attempted income tax evasion, was not the equivalent of a complete and reasonably accurate "net worth statement", was not material proof of any relevant element of the case, and established no portion of the corpus delicti.

Respondent disagrees with the Government's contention that the court below was concerned only with respondent's alleged admission as to cash on hand, and not with the confession of unreported income in Exhibit 11 (Br. 27, 38). While the court below devoted its main discussion to the admission as to cash on hand, it specifically disagreed with the Government's "claim that Calderon's sworn statement given to the tax officials confessing the under-reporting of his income for the four years" was not an extra-judicial admission (R. 219). It held that neither the verbal nor written statements could be a basis for conviction without independent proof of the corpus delicti (R. 219). Therefore, the issue here is not simply with respect to an admission to a specific fact, but includes an alleged confession of guilt (Br. 27).

The facts to which the liberal rule was applied in *Dacche* indicate independent proof of a nature not found here. There the court found ample corroboration of the existence of an agreement to attack ships, outside of Dacche's confession. He was shown by independent evidence to have been in correspondence with co-conspirators, and to have tried to find means of getting explosives. These facts clearly established one element of the offense—attempting to destroy a vessel—and the confession was received to establish the second element—a conspiracy.

But as has been shown above, the two main elements of this offense are (1) unreported taxable income, and (2) a

willful attempt to evade the tax thereon. There was no evidence at all of the second element, and the Government had only made a beginning at proving the first. The admissions with respect to alleged cash on hand, and the confession in Exhibit 11 will be discussed separately.

The Government could not establish unreported taxable income until it had first accurately established a starting point for the net worth statement. It could not have an accurate starting point until it had accounted for all respondent's assets and liabilities to a reasonable degree of certainty. If the nature of the facts indicated there were assets not "visible" to the revenue agents, such as cash on hand or cash in a safe, the net worth statement could not be complete—and therefore "proves nothing" as the court below held (R. 218)—until those assets are established, or in some way accounted for.

The Government's so-called "independent" evidence established only "subsidiary facts", and was not sufficient to even tend to prove the first element of the offense. It is true that there was uncontroverted evidence of substantial increases in the "visible" assets which the agents saw (Br. 33). The respondent never disputed the fact that he had purchased visible assets during the tax period in question. In fact, he cooperated with the agents during the investigation, and turned over to them all his records (Br. 8-9, R. 87, 88, 140, 172-173). Furthermore, respondent stipulated to all of the assets except "cash on hand" and "cash in bank" (Br. 4, R. 8-9).

The largest increase in any single asset was in the coin-operated machines used in his business. The Government calculated that respondent increased his visible net worth during 1946 by approximately \$16,000 in this single asset

(Br. 6-7). But proof of this subsidiary fact does not in any way indicate a real increase in net worth or in taxable income. With respect to this particular asset, respondent testified specifically that the source of funds used to purchase these machines in 1946 was cash he had in his safe at the end of 1945,—or as the accountants state it, on December 31, 1945 (R. 64-66, 164-165). The Government offered no proof whatsoever of the source of any funds used to purchase any of the assets. It considered the \$16,000 increase in the asset coin-operated machines income in 1946 solely on the basis that "they popped up" or "came to light" in that year (R. 123).

This illustrates respondent's contention that merely showing an increase in visible assets—as the Government did here—does not tend to prove in fact an increase in net worth, or current taxable income, or an element of the offense of a willful attempt to evade a tax.

The agents arbitrarily selected January 1, 1944 as a starting point. They knew respondent had been in business since 1935 (R. 83), but they made no investigation to determine whether he had accumulated any cash prior to 1944 and relied solely upon his alleged admission. Agent Tucker admitted that he was aware that business was very good in Douglas during the war (R. 83, 91), and knew that respondent had not made any deposits in his savings account from June 1943 to October 1945 (R. 84, 91-92).

The inadequacy of the agents' investigation is evident, and their own testimony establishes it was illogical to interpret any statement respondent may have made during the several interviews as a positive admission that he had on hand *exactly* \$500 on December 31st of six successive years. In fact, although Tucker testified respondent told

him he believed he had \$500 on hand "on the last day of each year" (R. 59). Tucker also stated he pointed out to respondent he must have had more on December 31, 1949 because he made a cash deposit in his bank account of \$1,971.50 on January 4, 1950 (R. 59). It is significant that the agents did *not* accept respondent's statement of \$500 cash on hand on December 31, 1949 because it was not to their advantage to do so. Since their investigation disclosed the deposit of \$1,971.50 in January 1950, they *put it back* into 1949 in order to *increase* respondent's income for that year. But they made no effort to ascertain whether respondent had more cash at the starting point than the \$500 he allegedly admitted, because it was to their advantage to keep that sum low.

If the agents knew anything at all about respondent's business—and they should have learned a great deal if they made a proper investigation—they knew that respondent did have plenty of cash—on December 31st as well as during the year. In fact, agent Tucker admitted that respondent "at times had more cash than that" (R. 85). As far as the record discloses, the only person to whom the agents talked about respondent's business was Verdugo. He told them that respondent "did carry cash, plenty of cash in his safe because of the nature of his business he had to be making change, cashing checks and so forth for his locations" (R. 138).

In the face of these positive facts which demonstrate the unreasonableness and implausibility of the alleged admission, how can the Government's contention be upheld that not one cent of funds on hand December 31, 1945 was used to buy the \$16,000 worth of new machines in 1946? They claim he started the year 1946 with exactly \$500 in

cash, and ended the year with exactly the same amount. Although respondent was unable to purchase new equipment during the four-year war period, while business was good, the agents claim he had not saved a dollar with which to buy the new equipment he purchased in 1946 (R. 64-65, 91, 164-165). Because they "saw" the equipment in 1946, and did not "see" the cash on December 31, 1945, they charged respondent with the receipt of current taxable income in 1946, even though the resulting net income of \$24,855.49 "was out of line" with the figures for the two prior years and two succeeding years (R. 122-123).

The Government contends it offered considerable evidence to negate the possibility that the unexplained increases in net worth could be accounted for by an undiscovered prior accumulation (Br. 34). A careful reading of the record fails to disclose *any evidence at all* offered by the Government on this point. It is necessary to call to this Court's attention an important point of evidence and procedure which should not be overlooked. The Government has made several references in its brief to evidence of facts which it claims *it* proved as part of its case, but which the record shows was not offered by the Government, or was received for an entirely different purpose than is claimed now by the Government.

At the trial the Government proceeded entirely on the theory that a net worth case based upon respondent's alleged admissions and confession was sufficient to convict. It offered no evidence at all about respondent's business or income, made no attempt to describe it, or to show he had income. It based its case upon the stipulation as to assets on hand at the beginning and end of each year plus the signed confession, Exhibit 11. It called only five witnesses, two

bank officers to identify bank records, two employees of the Bureau of Internal Revenue who conducted the investigation of respondent's income tax liability, and Mr. Verdugo, who prepared respondent's income tax returns (R. 31, 34, 40, 50, 127). Verdugo had no independent knowledge of respondent's business, and the only testimony he gave about income was what respondent had told him (R. 129).

After introducing in evidence respondent's income tax returns for the years 1946 to 1949, and some bank records, the Government started immediately to offer proof of net worth (R. 50). With no other evidence at all in the record, the Government offered evidence of respondent's alleged admission as to cash on hand (R. 51). Respondent objected at the outset to any evidence with respect to his admissions on the ground that no proper foundation had been laid, and that the corpus delicti had not been proven (R. 54, 56, 57). Respondent pointed out to the trial court that this point was crucial to the case, and requested an opportunity to cross-examine the witness on voir dire, which was not granted (R. 62-63). Respondent repeated his objection throughout the presentation of the Government's case (R. 68, 98, 100, 107) and at the close of the Government's case moved for a dismissal of the indictment and an acquittal on the specific ground that the corpus delicti had not been proven (R. 141). The description of respondent's background and financial circumstances on pages 4-6 and 34-35 of the Government's brief are based almost entirely on the respondent's testimony. It was not evidence offered by the Government as independent proof of the corpus delicti.

The Government also claims it offered proof of respondent's income tax returns for the years 1941 to 1945 to demonstrate that he had a modest income during that period (Br. 34-35). It cited no page reference to the

record to support its statement, and the record does not support it. At page 6 of its brief, the Government refers to Exhibits 12 and 13, respondent's income tax returns for 1944 and 1945. The record discloses that these exhibits were not offered by the Government as part of its case, and were not offered as affirmative proof to establish lack of prior accumulated funds. They were offered in evidence solely to *impeach* respondent's credibility, and the trial court limited their receipt to that single purpose (R. 183-186).

On page 6 of its brief the Government also refers to income tax returns for the years 1941 and 1942. The record page cited, page 81, does not mention any such returns, nor are they referred to anywhere else in the record. They may be mentioned in defendant's Exhibit A, which is not before this Court, but even if they are, this exhibit was not offered by the Government, but was received in evidence over its objection and used by respondent solely to impeach the credibility and accuracy of the Government agent who was testifying about respondent's alleged admissions with respect to cash on hand (R. 81-82). Offered in this form, it would not have been competent evidence for the Government. Furthermore, there is no showing that the court or jury ever saw the exhibit.

It is clear, therefore, that none of the defendant's testimony on cross-examination may be used as affirmative proof by the Government. See *United States v. Waldon*, 114 F. 2d 982, (C. A. 7) certiorari denied 312 U. S. 681.

In its petition for a writ of certiorari the Government raised only one objection to the opinion of the court below—the ruling with respect to the net worth starting point. Its brief in this court indicates that it considers that the only point decided (Br. 27). It is difficult to understand how

the Government reached this conclusion, as the alleged confession contained in Exhibit 11, if properly admitted, would have been sufficient so sustain a conviction under the arguments now presented by the Government, even if there had been no admissions as to cash on hand.

Respondent objected to the admission of Exhibit 11 on the same grounds as the other statements, viz. that the Government had not first established the corpus delicti by independent evidence (R. 107). The point was argued at length in his brief in the court below (Brief of Appellant in the Court of Appeals, pp. 4, 5, 6, 18-20). The court below considered this sworn statement an extra-judicial statement, and subject to the same requirement of corroboration as the other admissions (R. 219). As has already been amply demonstrated, there was no independent evidence that any income had in fact been omitted from the returns. The Government relied entirely upon proof of increases in net worth to justify its claim that there were unreported receipts. When the court below held the properly admitted evidence as to net worth was not sufficient to satisfy the minimum requirements of proof of the corpus delicti, it followed that Exhibit 11 was likewise inadmissible.

There can be no doubt that the Government is attempting to persuade this court to ease its burden of proof in criminal tax cases based upon the net worth method. It is not satisfied with the long record of convictions affirmed by the Ninth Circuit in tax cases involving proof by the net worth method. See, *Barcott v. United States*, 169 F. 2d 929 (C. A. 9), *Gendleman v. United States*, 191 F. 2d 993 (C. A. 9), *Davena v. United States*, 198 F. 2d 230 (C. A. 9), *Goldbaum v. United States*, 204 F. 2d 74 (C. A. 9),

Remmer v. United States, 205 F. 2d 277 (C. A. 9), *McFee v. United States*, 206 F. 2d 872 (C. A. 9), and others.

In all these cases, as well as the instant case, the Ninth Circuit followed the rule: "The fundamental question presented is what quantum of evidence must be offered by the Government before a trial court can properly submit the case to the jury." *Remmer v. United States*, *supra*, p. 280. In all the cases cited it held there was sufficient evidence to go to the jury. But when the instant case came up, with no independent evidence at all, it properly held that the Government could not short-cut taxpayers into jail. The law and the Constitution put the burden on the Government to prove guilt beyond a reasonable doubt. The instant decision means no more than that the internal revenue agents must do a thorough job of investigation, which was not done here.

The Ninth Circuit did not need to write a long opinion to explain to the Government all the things which were lacking in this case. It quickly pointed out at the beginning that respondent operated "a *legitimate* coin-machine business" (*italics supplied*) (R. 218). It was not dealing with a racketeer, or a clever, skillful, big-time gambler, or with huge sums of money and extravagant expenditures. What was presented was a "little fellow" with a good reputation for honesty among responsible citizens in the community, and a case so weak the Government had to try him twice in order to obtain a conviction (R. 86, 219). The court below had substained many convictions for the Government, but when the Government failed to present sufficient evidence that a crime was committed, it refused to permit it to stand, as it had previously done in *Spriggs v. United States*, 198 F. 2d 782 (C. A. 9).

In other cases the courts of appeals have upheld convictions where they felt the agents did make a thorough

investigation and produced a sufficient quantum of proof to fulfill the Government's burden. In *Remmer v. United States*, *supra*, p. 287, the court said: "In the instant case the Government thoroughly investigated appellant's potential sources of net worth." In *Pollock v. United States*, 202 F. 2d 281, 284, (C. A. 5) certiorari denied 345 U. S. 993, the court said: "In the present case the Government agents made a rather thorough independent investigation." In *McFee v. United States*, *supra*, p. 874, the court said: "In a net worth case the Government must establish with a reasonable degree of accuracy the taxpayer's net worth at the beginning and end of the period in question. We think the requirement was fully and adequately met in this case." In *Chapman v. United States*, 168 F. 2d 997, 1001 (C. A. 7) certiorari denied 335 U. S. 853, relied upon by the court below in reversing the conviction, the Seventh Circuit stated that: "In a 'net worth case' the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict." It affirmed the conviction there because it found the necessary corroboration.

As the Ninth Circuit stated in *Spriggs v. United States*, *supra*, it is not important whether the statement is labeled an admission or confession—under any name there must be independent proof of a crime having been committed before a conviction can be sustained. Furthermore, since cash on hand is an essential item in establishing net worth, and the net worth statement was the only evidence offered to prove both elements of the offense, (1) unreported taxable income and (2) intent to evade the tax thereon, the admission was of as great importance to a conviction as a confession of the

whole offense. The following quotation in *Gulotta v. United States*, 113 F. 2d 683, 686 (C. A. 8) is pertinent:

"Indeed, there is no sound reason why an uncorroborated voluntary admission of some element of crime should be given greater force as evidence of guilt than is accorded the accused's outright confession of the crime itself."

VI.

THERE WAS NO EVIDENCE OF WILLFULNESS

Although the Government agrees that there are two elements to this offense (1) unreported taxable income and (2) a willful attempt to evade the tax thereon, there is no discussion of the second element at all in its brief. Even if a jury may be permitted to assume that a mere showing by the Government of an increase in visible net worth is evidence of *current* taxable income, without independent proof of cash on hand at the starting point, and without proof negating the possibility that the increases were due to other non-taxable receipts, there is no justification for inferring a willful intent to evade the tax. In the instant case there was no evidence at all of conduct from which a jury could find the affirmative action or concealment indicated in *Spies v. United States*, 317 U. S. 492, 499, as necessary to establish the element of willful attempt to evade. The record is barren of any evidence which could be called indicia of fraud. A "bare" net worth case in which the Government simply lists assets and shows an annual increase beyond the reported income lacks an essential element of proof. There must be something additional, such as failure to keep records of income, false entries in books, concealing

sources of income, concealing ownership of assets by use of dummies or relatives, attempts to bribe, etc.

Respondent's income tax returns were based upon his books, in accordance with a method of accounting which the investigating agent considered adequate (R. 89). Even if the Commissioner has authority to set up a tax on a different accounting basis for purposes of collection, there is no justification for finding a taxpayer guilty of attempting to evade such tax in a criminal case. The unfairness of such a result is aptly illustrated in the instant case. The Government agent admitted that the net income based upon the net worth statement, showing approximately \$24,000 net income for 1946 "was out of line" with the figures of \$8,000 for 1944, \$8,000 for 1945, \$11,000 for 1947 and \$6,700 for 1948 (based upon the same net worth statement). He justified the assertion of the deficiencies solely on the ground that the assets "came to light" in those years (R. 123). Yet the uncontradicted evidence was that the Air Base closed down at the beginning of 1946, and business declined (R. 47, 180-181). It is unreasonable to conclude that business was much better in 1946 after the Air Base was closed, than it was during the war years.

A case predicated solely upon increases in net worth is entirely void of evidence from which a jury might infer intent to evade a tax. No evidence at all was presented from which any such inference could be drawn. On the contrary, the record discloses that respondent cooperated fully with the agents in their effort to determine his correct tax liability (R. 87, 88, 140, 172-173). He was not in an illicit business, and did not conceal either his business or his income. His returns disclosed his sources of income, and the Government does not claim he had any others. While

character evidence is not ordinarily of much weight on appeal, nevertheless, the fact that he was so well-known in the community that he was able to obtain as witnesses the Mayor (R. 147), Chief of Police (R. 149), a member of the Arizona State legislature (R. 143), and a former Deputy Collector of Internal Revenue (R. 150), demonstrates that it was unnecessary for him to hide his business or income. They all vouched for respondent's honesty and truthfulness. Since all the machines were operated openly and legally the means was available to the agents to check respondent's receipts from direct sources if they were interested.

The Government offered no evidence at all with respect to the element of intent. The only evidence in the record on this issue is Verdugo's testimony that he told the agents that in his own mind he was sure respondent never intended to defraud anybody (R. 141). There was evidence that respondent was thrifty and industrious, but none that he was dishonest (R. 143-151). Due to his lack of education and dependence upon others (R. 134, 138, 141, 151-152), his income may not have been correctly reported, but there was no evidence of fraud.

There is completely lacking proof of willful intent required by *Spies v. United States supra*, *United States v. Murdock*, 290 U. S. 389, and *Lurding v. United States*, 179 F. 2d 419, 422 (C. A. 6).

This is a "bare" net worth case. It represents an effort by the Government to extend the scope of prosecutions for attempted income tax evasion to new frontiers. In its zeal to enforce the revenue laws the Government is encroaching upon basic constitutional rights of citizens, and violating established principles of criminal law. Apparently what the

Government is now seeking is a special set of rules of criminal evidence and law to be applied to income tax prosecutions alone so that the prima facie correctness of the determination of the Commissioner of Internal Revenue will be sufficient to require a given defendant to prove his innocence. It is attempting to extend to criminal cases the special rule of ordinary civil cases (not involving fraud), which shifts the burden of proof to the taxpayer.¹⁴

The court below, which has sustained many convictions based upon the net worth method, recognized that there was danger of violation of defendants' constitutional rights in the Government's unbridled use of the net worth method of computing income. Millions of taxpayers file returns every year, and thousands are later found to have underpaid their taxes. But only where the understatement was with intent to evade the tax is a crime committed. The crux of the offense is willfulness. The Government must prove by direct proof or circumstances that a taxpayer knew or should have known his return was false. "There is no presumption that may be drawn from the act itself (filing an inaccurate return)—both knowledge and willfulness must be established by independent proof, direct or circumstantial." *Lurding v. United States supra* p. 422. "A willful evasion of the tax requires an intentional act or omission" and "a conviction cannot be sustained unless this state of mind is supported by the evidence" *United States v. Martell*, 199 F. 2d 670, 672 (C. A. 3).

¹⁴The Government contends for a less burden of proof of the element of intent in criminal cases than the Commissioner of Internal Revenue is required by the Tax Court to sustain with respect to civil fraud penalties. See cases cited at footnotes 12 and 13. See also *King Tsak Kwong v. Commissioner*, CCH Dec. 19, 924 (M) 12 TCM 1136.

This Court has carefully considered the relation of this offense to other penalties imposed by Congress to enforce the tax laws. *Spies v. United States supra*. Congress has provided three separate and distinct methods and procedures for enforcing the revenue laws: (1) a civil proceeding in which the Commissioner's determination of a deficiency is prima facie evidence that a tax is due; (2) a civil proceeding in which the Commissioner asserts a 50 per cent penalty for fraud and *the Commissioner has the burden of proving fraud* by clear and convincing evidence; (3) a criminal proceeding, which is available when the case warrants punishment in addition to the 50 per cent penalty, and where the Government has the burden of proving beyond a reasonable doubt every element of the offense, including a tax liability.

"The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat a tax" * * *

"But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer". *Spies v. United States, supra*, p. 497.

"We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful *commission* in addition to the willful omissions that make up the list of misdemeanors". (italics supplied) *id.* p. 499.

Under this test mere proof of increases in net worth, without other evidence of affirmative acts, is insufficient to establish the criminal intent required by the statute.

VII.

THE DECISION OF THE COURT BELOW REVERSING THE CONVICTION WAS CORRECT.

The court below did not engraft an extension upon the corroboration rule as contended by the Government (Br. 12, 14, 19). It did apply fundamental principles of criminal law. As this Court said in *Brinegar v. United States*, 338 U. S. 160, 174:

“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”

The decision below is in accord with the principle that where the prosecution relies upon circumstantial evidence, the evidence must exclude every reasonable hypothesis other than the guilt of the defendant. *Bryan v. United States*, *supra*, p. 227; *United States v. Fentwick*, *supra* p. 492; *Hanson v. United States*, 208 F. 2d 914, 916 (C. A. 6).

Since almost every adult in the United States is subject to the income tax laws, almost every adult in the country is a possible suspect. Perhaps no other Federal offense has such a wide field in which it may occur. The number of

persons who may be involved in offenses involving contraband, such as counterfeiting or narcotics, is a comparatively small percentage of the population. In view of the fact that almost everyone is liable to the income tax law, and since the determination of the correct tax liability is very often a difficult problem involving honest disagreement between taxpayers and the Commissioner of Internal Revenue, criminal penalties should be imposed only in the clearest cases. Where the Government offers definite proof of specific income omitted, or false deductions claimed, the intent to evade may be clear. But when the Government uses a theory to attempt to reconstruct income or assume that there must have been income, there is cause for grave concern as to the wisdom of such a policy. There is serious doubt that a net worth computation has sufficient reliability as proof of current taxable income that its use should be permitted at all in a criminal case. But if it is to be permitted, certainly there should be definite standards which should be met as prerequisites requiring the Government to establish guilt beyond a reasonable doubt with evidence of demonstrated probative value.

The court below correctly ruled that it was error to have admitted in evidence the oral and written admissions made to the agents. Without the alleged oral admissions with respect to cash on hand there was no complete net worth statement, and without the written statement, Exhibit 11, there was no other evidence of unreported income.

In holding that the record lacked independent evidence of the corpus delicti the court below followed a long line of its own decisions as well as other courts of appeals (see pp. 58-60 *supra*). It is the Government which now seeks a new rule, to enable it to obtain convictions without afford-

ing taxpayers the fundamental rights granted to defendants in all other kinds of criminal cases. The proper enforcement of the internal revenue laws does not require that the Government be granted the same privileges as to burden of proof in criminal cases as it enjoys in ordinary civil cases in the Tax Court.

From the holding that there was no independent evidence of the corpus delicti, it necessarily follows that the Government failed to prove a prima facie case. Accordingly, the motion for acquittal should also have been granted. Having tried respondent twice, and the record clearly demonstrating that the Government does not possess sufficient legal evidence to convict him, it is not in the interests of fairness and justice to award the Government a third try.

CONCLUSION

It is respectfully submitted that the judgment of the court below reversing and remanding should be modified by an instruction to reverse and enter a judgment of acquittal.

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